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No.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL-CIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-9a) is reported at 535 F. 2d 87. The Board's decision and order (App. D, *infra*, pp. 14a-36a) are reported at 216 NLRB 45.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 10a-11a) was entered on March 31, 1976, and the Board's timely petitions for rehearing and rehearing *en banc* were denied on June 25, 1976 (App. C, *infra*, pp. 12a-13a). On September 13, 1976, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a pre-hire agreement between an employer and a union, entered into pursuant to Section 8(f) of the National Labor Relations Act, privileges recognitional picketing by a minority union which would otherwise violate Section 8(b)(7)(C) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

> Sec. 8. * * * (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative

> of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
>
> * * * * *
>
> (C) where such picketing has been conducted without a petition under section 9 (c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: * * *
>
> * * * * *
>
> (f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established un-

der the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

STATEMENT

In May 1973, Higdon Construction Company executed a contract with Glenmore Distilleries to erect a facility in Owensboro, Kentucky, using union labor. In order to comply with its contract with Glenmore, Higdon Construction sought to employ ironworkers through respondent Union's[1] hiring hall. The Union refused to furnish employees unless Higdon Construction accepted the area-wide labor agreement which had been entered into with a multi-employer association. Higdon Construction attempted at first to use nonunion labor. However, after the Union and other labor organizations struck the Glenmore jobsite, Higdon Construction signed an acceptance of the Union's area-wide agreement on July 31, 1973. The agreement contained no union security clause or dues check-off provision, and was to expire by its terms on March 31, 1976. The agreement professed to cover all employees within the Union's geographic jurisdiction who performed iron work for signatory companies. Higdon Construction complied with the agreement with respect to employees hired for the Glenmore job (App. D, *infra*, pp. 15a, 29a-30a).

In July 1973, Gerald Higdon, the sole owner of Higdon Construction, formed Higdon Contracting Company for the purpose of performing nonunion ironwork jobs.[2] Thereafter Higdon Contracting suc-

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[1] Local 103 of the Iron Workers.

[2] The Board found that Higdon Contracting was the *alter ego* of Higdon Construction, and thus bound by the latter's

cessfully bid on jobs for W.R. Grace Co. and Barmet Industries. After work on those jobs began in early 1974, Higdon Contracting refused the Union's demand that the prior agreement be applied to those jobs as well. In response the Union picketed the jobs with signs stating that Higdon Construction was in violation of its agreement with the Union. Picketing at the Grace jobsite began on January 29, 1974, and continued until March 1, 1974. The Union picketed the Barmet jobsite for five days in March 1974 (App. D, *infra*, pp. 15a-17a, 28a, 30a-31a).

Neither on July 31, 1973, nor at any time thereafter did the Union have, or claim to have, the support of a majority of the employees of Higdon Construction or Higdon Contracting within an appropriate bargaining unit. At the time of the picketing of the Grace and Barmet jobsites the Union was not the certified representative of the Hidgon Contracting or Higdon Construction employees and did not file a petition for an election under Section 9 of the Act (App. D, *infra*, pp. 15a, 17a, 31a).

Upon a charge filed by Higdon Contracting,[3] the Board found that the Union violated Section 8(b)(7)(C) of the Act by picketing for recognition at the Grace jobsite for a period of more than 30 days

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agreement with the Union (App. D, *infra*, p. 20a, n. 7). Higdon Construction and Higdon Contracting are sometimes collectively referred to hereafter as "Higdon".

[3] The General Counsel of the Board refused to issue a complaint on the Union's charge that Higdon had violated Section 8(a)(1), (3), and (5) of the Act (App. D, *infra*, p. 17a).

when it did not represent a majority of Higdon's employees and when a petition for a representation election had not been filed. The Board rejected the Union's contention that the picketing was privileged as a means of enforcing its agreement with Higdon (App. D, *infra*, p. 21a).

The Board found that the agreement between the Union and Higdon was a valid pre-hire agreement under Section 8(f) of the Act. However, the Board noted that, in *R.J. Smith Construction Co.*,[4] it had held that, "although Section 8(f) of the Act clearly exempts a company and union from unfair labor practice liability for entering into a contract prior to establishment of the union as a majority representative, [it] does not protect the union from inquiry into its majority status during the contract term" (App. D, *infra*, pp. 17a-18a). Accordingly, the Board held that "where a union never thereafter obtains majority status, the company does not violate Section 8(a)(5) and (d) of the Act by refusing to continue the bargaining relationship established and by unilaterally changing terms and conditions of employment set forth in the contract" (App. D, *infra*, p. 18a). The Board concluded (*id.* at 20a):

> For the Board to allow the [Union] to picket to enforce an 8(f) agreement if an employer decides to ignore it, as the Employer herein

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[4] 191 NLRB 693, enforcement denied *sub nom. Local 150, Operating Engineers* v. *National Labor Relations Board*, 480 F. 2d 1186 (C.A. D.C.), decision on remand, 208 NLRB 615. See also *Ruttmann Construction Co.*, 191 NLRB 701.

> has done with respect to nonunion jobs, which [the Union] could not enforce by means of obtaining an 8(a)(5) bargaining order, is to permit it to do by indirection what it could not do directly, and in effect nullify our decision in *R.J. Smith* and its progeny that such contracts are voidable by either party if a union never thereafter obtains majority status.

The Board ordered the Union to cease its unlawful recognitional picketing (App. D, *infra*, pp. 22a-23a).

The court of appeals denied enforcement of the Board's order. Adhering to the view of Section 8(f) which it had previously expressed in reversing the Board's decision in *R.J. Smith*,[5] the court stated (App. A, *infra*, pp. 8a-9a):

> [U]nions which are parties to pre-hire agreements have the right to complain of unfair labor practices, including alleged refusals by the employer to bargain collectively, before the union achieves majority. Conversely, an employer who has entered into a validly executed Section 8(f) pre-hire agreement may, after a reasonable period, seek a representation election to challenge an enduring minority union. The Company here could have taken that step but did not. It was the Company, Higdon, which committed an unfair labor practice when, of its own motion, it refused to bargain collectively with the Union.

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[5] *Local 150, Operating Engineers* v. *National Labor Relations Board*, 480 F. 2d 1186 (C.A. D.C.).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals is contrary to the fundamental principles of the National Labor Relations Act that employees in a bargaining unit are free to select their own bargaining representative and cannot be bound by the terms of an agreement entered into by a labor organization which is not their selected representative. Section 8(b)(7)(C) of the Act was enacted to protect those rights by placing strict limitations on the ability of a union to compel employer recognition of the union by means of picketing and by requiring the union, within a reasonable time, to demonstrate that it has the support of a majority of the employees. By holding that Section 8(b)(7)(C) does not apply to a minority union that is party to a pre-hire agreement authorized by Section 8(f) of the Act, the court of appeals has authorized minority unions coercively to impose contract terms upon employers and employees without ever having to demonstrate majority support in the appropriate unit, and has shifted the burden to the employer to initiate the Board's election process to oust a union that has never even claimed majority support.

The court of appeals in this case has continued to apply an earlier precedent that misconceives the scope of Section 8(f). In light of Section 10(f) of the Act, 29 U.S.C. 160(f), which permits a union always to seek review in the Court of Appeals for the District of Columbia Circuit, the Board is faced with

the prospect of having either to abandon its view of the Act or invite further reversal in that court. In view of the substantial and important questions presented concerning the administration of the Act, review by this Court is warranted.

1. A basic tenet of the Act is that employees shall have the right "to bargain collectively through representatives of their own choosing." Section 7, 29 U.S.C. 157. One of the most important protections of that right is Section 8(b)(7)(C), which was enacted in 1959 and was designed to limit the coercive impact of recognitional picketing by channeling the underlying question of representation into the election procedures of Section 9. As this Court stated in *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 632:

> One of the major aims of the 1959 Act was to limit "top-down" organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees. Congress accomplished this goal by enacting § 8(b)(7), which restricts primary recognitional picketing * * *. Construction unions are fully covered by [this section].

Under Section 8(b)(7)(C) it is an unfair labor practice for an uncertified union to engage in recognitional picketing for more than a reasonable period of time, not to exceed 30 days, unless a representation petition is filed with the Board within that time. If a timely petition is filed, Section 8(b)(7)(C) provides for an expedited election, to insure that

the representation question will be promptly resolved by the free choice of a majority of the employees concerned rather than by the ability of the employer and the employees to withstand the adverse economic impact of the picketing. See *International Hod Carriers, Local 840 (Blinne Construction Co.)*, 135 NLRB 1153, 1156-1158; *Dayton Typographical Union No. 57* v. *National Labor Relations Board*, 326 F. 2d 634, 636-638 (C.A. D.C.); *Department & Specialty Store Employees' Local 1265* v. *Brown*, 284 F. 2d 619, 625-627 (C.A. 9), certiorari denied, 366 U.S. 934.

The Union's picketing came squarely within the ban of Section 8(b)(7)(C). The Union has never been certified by the Board as the representative of Higdon's employees. Nor has it ever been selected by a majority of those employees as their representative. Nevertheless, the Union picketed Higdon for more than 30 days, during which time no representation petition was filed. The avowed purpose of the picketing was to compel Higdon to adhere to the pre-hire agreement executed in July 1973 and thus, in effect, to recognize the Union as the bargaining representative of Higdon's employees at the Grace jobsite.[6]

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[6] The Union in its briefs in the court of appeals objected to the Board's characterization of the picketing as "recognitional" and insisted that the picketing was merely to enforce an agreement (Union Br. 7; Union Reply Br. 1). The Union, however, offered no reason to doubt the Board's conclusion that picketing to enforce a union contract constitutes picketing to compel recognition of the union as the employees' bargaining representative, and the court of appeals' opinion clearly assumed the correctness of that conclusion.

2. Section 8(f) of the Act does not create an exception to the limitations on recognitional picketing set forth in Section 8(b)(7)(C). As this Court stated in *Connell Construction Co., Inc., supra*, 421 U.S. at 632, "[c]onstruction unions are fully covered by [Section 8(b)(7)]." Section 8(f) merely provides that it shall not be an unfair labor practice for an employer in the construction industry to make an agreement (commonly called a "pre-hire agreement") with a union covering employees in that history *before* the majority status of the union has been established. Section 8(f) also provides that any such agreement "shall not be a bar" to the filing of a petition by the union, the employer, or a group of employees for an election under Section 9. However, nothing in Section 8(f) provides or suggests that a union that is party to a pre-hire agreement is relieved, until the agreement expires, of the obligation of acquiring majority support or of demonstrating that support before a bargaining obligation, enforceable through Section 8(a)(5), may be imposed upon the employer. Nor does Section 8(f) relieve unions in the construction industry from the restrictions on "top-down" organizing imposed by Section 8(b)(7)(C).

The opinions of the court of appeals in this case and in *Local 150* provide in effect that unions in the construction industry are relieved of those obligations and restrictions. While the court purported to recognize that Section 8(f) "does not wholly obviate the union's need ultimately to achieve majority

status,"[7] the court has held that a union that makes no effort to achieve, or pretense of having achieved, majority support may nevertheless, by unlimited picketing or by obtaining a bargaining order under Section 8(a)(5), enforce a pre-hire agreement for the entire term of the agreement or until the completion of a Board-held election initiated by the employer. Thus the court has in fact obviated the union's need to achieve majority status and has placed the burden on the employer to take steps to establish that the union does not represent a majority of his employees.

3. The court of appeals concluded that the Board's position is inconsistent with Congress' purpose in sanctioning pre-hire agreements in Section 8(f) because the Board would make such agreements "virtually unenforceable".[8] The court further concluded that Congress intended, by the final proviso of Section 8(f), to provide that the only means of challenging a union's lack of majority support in the context of a pre-hire agreement is for the employer to file a petition for a Board election. Those conclusions are erroneous. The Board's position is fully consistent with the purposes of Section 8(f) and constitutes an interpretation of Section 8(f) which is consistent with the fundamental policies of the Act.

The legislative history of Section 8(f) demonstrates that Congress intended by that section to

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[7] *Local 150, supra*, 480 F. 2d at 1190.

[8] *Local 150, supra*, 480 F. 2d at 1190.

create a limited exception for employers and unions in the construction industry from the general rule under the Act that collective bargaining agreements can be concluded only after the union has been selected by the majority of the employees in the unit.[9] The purpose of the exception was explained in the following statement in the report of the Senate Committee on Labor and Public Welfare:

> In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated. The practice of signing such agreements for future employment is not entirely consistent with Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired. One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply

[9] See *The Lukas-Harold Corp.*, 44 NLRB 730; *Solar Aircraft Co.*, 48 NLRB 242; *Sardik Food Products Corp.*, 46 NLRB 894, 896; *Chicago Freight Car & Parts Co.*, 83 NLRB 1163, 1164-1165. See also the testimony of General Counsel Bott, Hearings on S. 1973 before a Subcommittee of the Senate Committee on Labor and Public Welfare, 82d Cong., 1st Sess. 190 (1951).

> of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired. [S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959); I Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, 86th Cong., 1st Sess. 424 (G.P.O. 1959), hereafter "Leg. Hist. (1959)".]

Section 8(f) attempted to meet this problem by providing that a pre-hire agreement in the construction industry does not constitute an unfair labor practice.

The legislative history makes clear, however, that Congress did not intend pre-hire agreements automatically to confer representative status on the union or to obviate the union's obligation to acquire majority support. Thus Congress rejected a proposal that would have permitted the Board to certify a union signing a pre-hire agreement as the employees' representative without an election or other proof of majority support but merely upon a showing of a history of bargaining between the union and the employer.[10]

[10] See 105 Cong. Rec. 6431, II Leg. Hist. 1082 (1959) (Senator Goldwater); 105 Cong. Rec. 15541-15542, II Leg. Hist. 1578 (1959) (analysis by Representatives Thompson and Udall).

This proposal would have cloaked the union with representation and bargaining rights for at least a year. See *Brooks v. National Labor Relations Board*, 348 U.S. 96.

Instead Congress provided that the representative status of the union could be challenged at any time. As this Court stated in *Connell Construction Co., Inc., supra*, 421 U.S. at 632:

> The only special consideration given [construction unions] in organizational campaigns is § 8(f), which allows "pre-hire" agreements in the construction industry, but only under careful safeguards preserving workers' rights to decline union representation.

The Board's decision here is consistent with the intent of Congress set forth above. Employers and unions in the construction industry will still be able to conclude pre-hire agreements that will provide the employer with the needed certainty in determining his costs and with a ready supply of skilled employees. As Congress anticipated, in many cases the union will in fact represent a majority of the employees later hired. Moreover, even if the union does not acquire the support of a majority of the employees hired immediately after the commencement of a project, Section 8(b)(7)(C) provides the union with a reasonable period of time to picket to enforce the terms of the agreement. The decision of the Board here is concerned only with those cases in which the union, after a reasonable period of time, is unwilling or unable to demonstrate that it has in fact the support of a majority of the employees in the unit. In those circumstances neither Section 8(f) nor any other provision of the Act permits an agreement to be imposed on employees who have not

assented to it through a bargaining agent of their own choosing.

Nor is the court of appeals' decision justified by its concern that the Board's position makes pre-hire agreements "virtually unenforceable." If the union achieves majority support, the employer and his employees are bound by the agreement.[11] And, in any event, the Board's position does not make pre-hire agreements more "unenforceable" than the decision of the court of appeals. Under the court's decision, a pre-hire agreement becomes unenforceable after a Board election, initiated by the employer's petition, determines that the union lacks majority support. The significant difference between the court's position and the Board's relates to *when* the agreement becomes unenforceable and who has the burden of triggering the determining event.

The court's conclusion that the employer has the burden of initiating procedures to determine the union's lack of majority support in effect accords the union a presumption of representative status that Congress specifically declined to confer in enacting Section 8(f), and is contrary to the basic scheme of the Act, which imposes an affirmative obligation

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[11] If the union can show that, after execution of the pre-hire agreement, it has obtained the support of a majority of the employees, the Board will find that an employer who has repudiated the agreement has violated Section 8(a)(5), and require that it honor the agreement and continue to recognize and bargain with the union. See *National Labor Relations Board* v. *Irvin*, 475 F. 2d 1265, 1270-1271 (C.A. 3), enforcing in relevant part, 194 NLRB 52.

on unions to achieve and demonstrate majority support. Moreover, the court's conclusion that Section 8(f) requires an employer to file an election petition to unseat a minority union is contrary to the plainly permissive language of the proviso to Section 8(f), which states that a pre-hire agreement "shall not be a bar" to the filing of a petition.

Finally, the court's conclusion is contrary to the principles set forth in *Linden Lumber Division* v. *National Labor Relations Board*, 419 U.S. 301. There this Court held that an employer, even when confronted with union authorization cards from a majority of his employees, is not required by the Act to petition for an election and await the results before he may decline to bargain with the union. The Court held that the Act places the burden on the union to establish its majority and rejected the court of appeals' view that Congress, by permitting employers to petition for elections in Section 9, intended to make the filing of a petition the employer's only means of contesting the union's status when confronted with evidence of majority support. As the Court observed, "[l]arge issues ride on who takes the initiative." 419 U.S. at 308. That observation is equally pertinent when, as here, the union does not even claim to represent a majority of the employees. To require employers in those circumstances to abide by a pre-hire agreement until they petition for an election to formalize the union's lack of majority support, is contrary to the Act's fundamental principle that employees shall have the right "to bargain collectively through representatives of their own choosing" (Section 7, 29 U.S.C. 157), and to this Court's admonition that the 1959 amendments to the Act were designed to limit "top-down" organizing practices (*Connell Construction Co., Inc., supra*, 421 U.S. at 632).

5. The court of appeals also expressed concern that the Board's interpretation will lead employers to discourage union membership through "flagrant unfair labor practices" in order to insure that the union never attains a majority. *Local 150, supra*, 480 F. 2d at 1190. However, here, as in *Linden Lumber Division, supra*, there was no evidence of unfair labor practices by the employer. Moreover, the Act contains ample remedies to deter and check employer conduct designed to discourage union membership, including injunctive relief under Section 10 (j), 29 U.S.C. 160(j). In any event, as the Court observed in *Linden Lumber Division, supra*, 419 U.S. at 309, "[t]he Board has at least some expertise in these matters," and the Board's judgment that here, as in other contexts under the Act, the union, not the employer, has the burden of achieving and demonstrating majority support is entirely reasonable. And, of course, the Board's interpretation would remain subject to reconsideration, by the Board or by Congress, in the light of experience with its application and consequences.

6. Since the District of Columbia Circuit has now indicated its adherance to its earlier decision in *Local 150, supra*, despite the Board's continued dis-

agreement with that decision, and since an aggrieved party is always entitled to petition to review a Board order in that Circuit no matter where the unfair labor practice occurred,[12] the Board, as a practical matter, is faced with the choice of either abandoning what it believes to be a correct interpretation of Sections 8(f) and 8(b)(7)(C) or facing further reversal by the District of Columbia Circuit. In these circumstances review of the issue by this Court is warranted.

[12] Section 10(f) of the Act, 29 U.S.C. 160(f), provides, in relevant part:

> (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
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NOVEMBER 1976.

APPENDIX A

COURT'S OPINION

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1060

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of Order of
National Labor Relations Board

Argued November 21, 1975

Decided March 31, 1976

Sydney L. Berger, with whom *Charles L. Berger* was on the brief, for petitioner.

Aileen A. Armstrong, Attorney, National Labor Relations Board, with whom *John S. Irving*, Deputy

General Counsel, *Patrick Hardin*, Associate General Counsel, *Elliott Moore*, Deputy Associate General Counsel, and *Robert A. Giannasi*, Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Before: DANAHER, *Senior Circuit Judge*, LEVENTHAL, *Circuit Judge*, and VAN PELT,* *United States Senior District Judge* for the District of Nebraska

Opinion for the Court filed by *Senior Circuit Judge* DANAHER.

DANAHER, *Senior Circuit Judge*: Local Union No. 103 filed its petition stating the issue thus:

> Whether an employer can abrogate unilaterally and breach a validly executed collective bargaining pre-hire agreement merely because the agreement was a pre-hire agreement in the construction industry validly entered into pursuant to Section 8(f) of the National Labor Relations Act.[1]

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* Sitting by designation pursuant to Title 28, U.S. Code § 294(d).

[1] Additionally the Union poses the inquiry:

> Whether the National Labor Relations Board may disregard and refuse to follow this Court's decision in *Local No. 150, International Union of Operating Engineers, AFL-CIO* v. *National Labor Relations Board*, 156 U.S.App.D.C. 294, 480 F.2d 1186 (1973).

In that case we noted that two members of the Board had dissented. We concluded that the Board's order had been premised upon an erroneous construction of the Act where

The Board by way of counterstatement suggests that we consider:

> Whether the Board properly found that the Union violated Section 8(b)(7)(C) of the Act by conducting recognitional picketing at the Company's job-sites for more than 30 days without filing a representational petition.

It is clear enough that the Board was—and is—unhappy with this court's opinion in *Local No. 150* v. *National Labor Relations Board*, footnote 1, *supra*. Although the Board had never appealed, nor did it seek rehearing *en banc*, it now asks us to reconsider and overrule our *Local 150* decision.

BACKGROUND

The Board in its Decision and Order noted that the material facts are essentially undisputed, with Higdon Construction Company, an employer engaged primarily in the building and construction industry within Section 8(f) of the Act, and Local 103, by the same token, a labor organization of building and

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the Board had held that R. J. Smith Construction Company, Inc., had not violated the Act when it unilaterally changed existing wage rates at a time when it had a pre-hire contract with the Union. In the instant case, the Administrative Law Judge (ALJ) concluded that the Board should dismiss the complaint against the Union, but after the General Counsel had filed exceptions to the decision of the ALJ, the case was submitted to a three-member panel of the Board which overruled the ALJ and found the Union guilty of an unfair labor practice by its picketing.

construction employees. Higdon Construction Company (herein Higdon Construction) and the Local had had a collective-bargaining relationship since 1968. Their initial contract which expired in December 1972 had been negotiated under Section 8(f).

In July 1973 Higdon Construction was engaged in the the performance of a construction contract at Glenmore Distillery. Local 103 refused to furnish employees unless Higdon Construction were to execute a contract. After the job had twice been shut down, Higdon Construction on July 31, 1973, signed an acceptance of agreement covering Local 103 Ironworkers. Higdon Construction agreed to abide by an existing agreement, which by its terms expires on March 31, 1976, between Tri-State Iron Workers Employers Association, Inc. and Local 103.[2]

The Union did not then or thereafter represent or claim to represent a majority of Higdon Construction's employees. Some employees were supplied by the Union at the Glenmore site, and wages and con-

[2] That contract contains no union-security clause and no checkoff provisions. We attach no significance to that fact despite a contrary view submitted by Board counsel at oral argument. The point had not been discussed in the Board's opinion nor asserted as a controlling factor. Obviously, we can affirm only on grounds which would comport with the Court's rulings in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) and *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-69 (1962).

We do not accept the Board's thus restated repudiation of *Local No. 150, supra*, note 1, where we specifically ruled contrary to the Board's position. *See* 156 U.S. App. D.C. at 298 & n.7, 480 F.2d at 1190 & n.7.

tributions to the welfare fund were paid for them in accordance with the contract.

Gerald J. Higdon [3] in July 1973 caused to be created the Higdon Contracting Company (hereinafter, Higdon Contracting) which had bid successfully on nonunion iron work of W. R. Grace Co. at Owensboro, Kentucky, and of Barmet Industries, Inc. at Rockport, Indiana. Higdon *Contracting* was the charging party in the proceedings under consideration.

In January 1974 after construction was commenced at the W. R. Grace jobsite, the Union began, and from time to time thereafter until March 1974 continued, to picket with picket signs carrying the legend:

[3] The Board in its opinion tells us:

> Gerald J. Higdon is the sole stockowner of both Higdon Contracting and Higdon Construction and the president of both companies. His son is secretary-treasurer of both companies. The directors are the same. Higdon Construction, which owns all the equipment, leases the equipment to Higdon Contracting. Trucks used by Higdon Contracting on the Grace jobsite, discussed *infra*, bear the name of Higdon Construction. In addition, an invoice dated March 8, 1974, indicates that material worth $96,788, for a building on the Rockport, Indiana, site, discussed *infra*, was charged to Higdon Construction. Higdon testified that Higdon Construction is the "only one that has any par value at all" and "it's one and the same companies. . . ."

The Board found that Higdon Construction and Higdon Contracting were actually a single integrated employer, and herein we may refer to the Company simply as Higdon, or occasionally as the Company.

> Higdon Construction Company is in violation of the agreement of the Iron Workers Local No. 103.

Although Higdon could have filed a petition seeking an election, it did not do so, and neither did Local 103. Instead, it seemed clear enough to the Administrative Law Judge, that Higdon had sought to proceed at the Grace jobsite with nonunion labor and in disregard of the pre-hire agreement with the Local. The Board noted that when the Local's business representative sought to sign up the Company, Gerald J. Higdon took the position that so to act "would defeat the purpose I had started out to do . . .". The Board in its Decision and Order specifically recognized that Higdon Contracting had been formed in July 1973 to perform nonunion ironwork jobs.

So it was that the Local commenced its picketing at the Grace jobsite on January 29, 1974, and continued off and on until March 1, 1974. A similar situation developed at the Barmet jobsite about February 20, 1974, and continued on various days up to March 20, 1974. In both locations the picket signs read as above set out.

Rejecting the views of the ALJ, the Board concluded that the Local's picketing had for its object the forcing of the Company to bargain with it without being currently certified and without having filed a petition for an election within a reasonable period of time. The Board's order directed the Local to cease and desist from picketing as a means of

forcing or requiring the Company to recognize or bargain with the Local as the representative of its employees in violation of Section 8(b)(7)(C) of the Act.

I

The Board's Decision and Order here reverted to its own position in *Local No. 150*, *supra* note 1, involving *R. J. Smith Construction Co., Inc.*, 191 NLRB 693 (1971). The Board there had ruled that Section 8(f) does not protect the Union from inquiry into its majority status during the contract term. The Board here went on to reaffirm its previous holding, despite our opinion in *Local No. 150*, even as it noted as undisputed, that the instant July 31, 1973, contract was a "prehire agreement lawfully executed under Section 8(f) of the Act prior to the establishment of the Respondent's majority status."

The Board declined to accept the appraisal by the ALJ who sought to give effect to this court's ruling in *Local No. 150*. The Board read the record here as containing evidence

> that the Employer sought to adhere to the contract for union work, such as the Glenmore contract, and to avoid it as to nonunion work by the creation of a second corporation.

Correctly identifying the position taken by the ALJ that the picket legend had published the truth, the Board continued:

> . . . He found that the target of Respondent's picketing was not to force or require the Em-

ployer to initially accept the Union as the bargaining representative since that had already been accomplished, but instead was to secure compliance with an existing contract, a permissible objective. We disagree.

II

No substantial advantage will be achieved by further analysis of the details of the Board's effort here to justify its rejection of the holding of this court in *Local No. 150, (R. J. Smith)*, or the post-hoc efforts of the Board's appellate counsel to distinguish the instant case. Rather, we may simply and summarily demonstrate the adamant position of the Board by setting forth *its own* explanation thus:

> For the Board to allow the Respondent to picket to enforce an 8(f) agreement if an employer decides to ignore it, as the Employer herein has done with respect to nonunion jobs, which Respondent could not enforce by means of obtaining an 8(a)(5) bargaining order, is to permit it to do by indirection what it could not do directly and in effect nullify our decisions in *R. J. Smith* and its progeny that such contracts are voidable by either party if a union never thereafter obtains majority status. In these circumstances, we conclude that the picketing by Respondent to enforce a noneffective 8(f) contract was for initial recognitional purposes and therefore was proscribed by Section 8(b)(7)(C) of the Act.

It is our view that unions which are parties to prehire agreements have the right to complain of unfair labor practices, including alleged refusals by the em-

ployer to bargain collectively, before the union achieves a majority.[4] Conversely, an employer who has entered into a validly executed Section 8(f) prehire agreement may, after a reasonable period, seek a representation election to challenge an enduring minority union. The Company here could have taken that step but did not. It was the Company, Higdon, which committed an unfair labor practice when, of its own motion, it refused to bargain collectively with the Union. The principles so stated are applicable here and must control. *See Local No. 150* v. *N.L.R.B.*, *supra* note 1, 156 U.S. App. D.C. at 298, 299, 480 F.2d at 1190, 1191.

Reversed and remanded.

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[4] Board counsel in the Board's brief and at oral argument raised the possibility, nowhere adverted to in the Board's order, whether by way of reliance or otherwise, that this case is *a fortiori* controlled by *Dayton Typographical Union No. 57* v. *N.L.R.B.*, 117 U.S. App. D.C. 91, 326 F.2d 634 (1963).

Congress earlier had recognized that what could become an unfair labor practice in employer-employee situations in general was not so to be seen respecting the *construction industry* where building projects are of relatively short duration and where labor agreements of the usual type could not practically be given application. We noted as much in *Local No. 150* v. *N.L.R.B.*, *supra* note 1.

The union here is engaged in the construction industry and had been picketing to secure compliance with an existing contract valid under Section 8(f); the Typographical Union in *Dayton* was simply an uncertified but concededly majority union picketing to compel employer recognition. Here the Board summarily dismissed the Section 8(a)(5) charge which had been filed by Local 103. This action alone failed to conform to the thinking in *Dayton*, *cf.* the legislative history *generally*, and the discussion in *Dayton*, *supra*, 117 U.S. App. D.C. at 104, *et seq.*, 326 F.2d at 647, *et seq.*

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1975

[Filed Mar. 31, 1976, United States Court of Appeals for the District of Columbia Circuit, George A. Fisher, Clerk]

No. 75-1060

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: DANAHER, Senior Circuit Judge, LEVENTHAL, Circuit Judge and VAN PELT,* United States Senior District Judge for the District of Nebraska

JUDGMENT

This cause came on to be heard on a petition for review of an order of the National Labor Relations

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

Board and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the order of the National Labor Relations Board on review herein is hereby reversed and this case is hereby remanded to the Board, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: March 31, 1976

Opinion for the Court filed by Senior Circuit Judge Danaher.

A true copy:

Test: George A. Fisher
United States Court of Appeals for
the District of Columbia Circuit

By: /s/ Mary Mattingly,
Deputy Clerk

APPENDIX C

ORDER ON REHEARING

J-7996A

Local Union No. 103, Int'l Assn. of Bridge,
Structural & Ornamental Iron Wkrs., AFL-CIO
(Higdon Contracting Co., Inc.)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1975

[Filed Jun. 25, 1976, United States Court of Appeals
For the District of Columbia Circuit
George A. Fisher, Clerk]

No. 75-1060

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
HIGDON CONTRACTING CO., INTERVENOR

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges.

ORDER

The brief of Higdon Contracting Company, Inc., an intervenor herein, which among other things suggests a hearing *en banc* and the granting of oral argument, and the suggestion for rehearing *en banc* filed by the respondent National Labor Relations Board, having been transmitted to the full Court and there not being a majority of the Judges in regular active service in favor of having this case reheard *en banc*, it is

ORDERED by the Court *en banc* that the suggestions for hearing and for rehearing *en banc* are denied.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX D

DECISION AND ORDER

Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO[1] *and* Higdon Contracting Company, Inc. Case 25-CP-63-2

January 6, 1975

By Members Jenkins, Kennedy, and Penello

On August 23, 1974, Administrative Law Judge Lowell Goerlich issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The material facts are essentially undisputed. Higdon Construction Company has been an employer engaged primarily in the building and construction industry within the meaning of Section 8(f) of the Act, and Local 103 has been a labor organization of which building and construction employees are members within the meaning of Section 8(f). Higdon Construction Company, herein called Higdon Construction, and Respondent have had a collective-bargaining relationship since 1968. Their initial contract which expired about December 1972, had been negotiated under Section 8(f) of the Act. In July 1973, Higdon Construction was engaged in the performance of a construction contract at Glenmore Distillery. Local 103 refused to furnish employees unless Higdon Construction executed a contract, and together with Carpenters and Operating Engineers shut down the job twice. Whereupon, Higdon Construction on July 31, 1973, signed an acceptance of agreement covering Respondent's ironworkers by which Higdon Construction agreed to abide by an existing agreement between the Tri-State Iron Workers Employers Association, Inc., and Local 103, which by its terms expires on March 31, 1976. The contract does not contain a union-security clause or any checkoff provisions. Neither at the time the contract was executed nor thereafter did the Union claim to, or in fact, represent a majority of Higdon Construction's employees. The record indicates that some employees were supplied by the Union on the Glenmore job and wages and contributions to the welfare fund were paid for them according to the contract.

Higdon Contracting Company, the Charging Party, herein called Higdon Contracting, was formed in July 1973 to perform nonunion ironwork jobs.[2] It

[1] Herein called Local 103 or Respondent.

[2] Gerald J. Higdon is the sole stockowner of both Higdon Contracting and Higdon Construction and the president of

successfully bid on jobs of W. R. Grace Co. at Owensboro, Kentucky, and of Barmet at Rockport, Indiana. About January 1, 1974, shortly after construction at the W. R. Grace jobsite began, Local 103 Business Representative William Oglesby and Carpenters Representative Mosely talked to Higdon Contracting's general manager, Philip C. Kelly, and told him that Higdon Construction was in violation of its contract at the Grace jobsite. Thereafter, in February 1974, Oglesby asked Higdon "what was going on" at the Grace jobsite. Higdon replied that the reason the job was being handled under the new company's name was because Higdon had been forced into signing the contract at Glenmore, and Higdon had a lot of nonunion competition. When Ogelsby attempted to "get [him] signed up," Higdon responded that "this would be kind of silly for me to do this because it would defeat the purpose I had started out to do. . . ." Higdon admitted "it's one and the same companies . . . under one hat or another hat, depending on whether [he was] doing Union work or non-union work. . . ."

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both companies. His son is secretary-treasurer of both companies. The directors are the same. Higdon Construction, which owns all the equipment, leases the equipment to Higdon Contracting. Trucks used by Higdon Contracting on the Grace jobsite, discussed *infra*, bear the name of Higdon Construction. In addition, an invoice dated March 8, 1974, indicates that material worth $96,783, for a building on the Rockport, Indiana, site, discussed *infra*, was charged to Higdon Construction. Higdon testified that Higdon Construction is the "only one that has any par value at all" and "it's one and the same companies. . . ."

Local 103 caused pickets to be placed at the Grace jobsite on Jauary 29, 1974. Pickets remained at the site, except during periods of inclement weather (about 4 or 5 days) until March 1, 1974. The picket sign carried the following inscription:

> Hidgon Construction Company is in violation of the agreement of the Iron Workers Local Number 103

Higdon Contracting started the Barmet job on or about February 20, 1974. Within the first few days, Local 103 Business Agent Hill asked Kelly if "we" were going to use union people on the job. Kelly told him that Higdon Contracting was doing the job; it did not have a contract with the Ironworkers, and was not going to do the job as a union contractor. Hill said, "I'll get right on it." Thereafter, Local 103 picketed this job on March 4, 5, 18, 19, and 20, 1974, with the same signs described above.

Local 103 has not filed a petition seeking an election, nor has Higdon Contracting or Higdon Construction. Nor has Local 103 filed an 8(a)(2) charge. It did file charges alleging violation of Section 8(a)(1), (3), and (5), which were dismissed April 25, 1974.

In *R. J. Smith Construction Co., Inc.*,[3] the Board found that, although Section 8(f) of the Act clearly exempts a company and union from unfair labor practice liability for entering into a contract prior to

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[3] 191 NLRB 693 (1971), enforcement denied *sub nom. Local No. 150, Operating Engineers* v. *N.L.R.B.*, 480 F.2d 1186 (C.A.D.C., 1973), remand accepted 208 NLRB 615 (1974).

establishment of the union as a majority representative, Section 8(f) does not protect the union from inquiry into its majority status during the contract term. The Board thus concluded that Section 8(f) only protects from illegality the preliminary contractual steps of a prehire agreement, and that, where a union never thereafter obtains majority status, the company does not violate Section 8(a)(5) and (d) of the Act by refusing to continue the bargaining relationship established and by unilaterally changing terms and conditions of employment set forth in the contract. Since the Board found that the union had admittedly never attained majority status, it dismissed the refusal-to-bargain complaint.

As set out above, it is undisputed that the Union did not represent a majority of either the employees of Higdon Construction or of Higdon Contracting at any relevant time. Nor is it disputed that the parties' July 31, 1973, contract was a prehire agreement lawfully executed under Section 8(f) of the Act prior to the establishment of the Respondent's majority status. The Administrative Law Judge sought to distinguish this case from *R. J. Smith, supra*, on the ground that there is no persuasive evidence that the Employer actively repudiated the contract. Rather the evidence is that the Employer sought to adhere to the contract for union work, such as the Glenmore contract, and to avoid it as to nonunion work by the creation of a second corporation. The Administrative Law Judge therefore concluded that the picket legend published the truth. He found that the target

of Respondent's picketing was not to force or require the Employer to initially accept the Union as the bargaining representative since that had already been accomplished, but instead was to secure compliance with an existing contract, a permissible objective. We disagree.

In *Ruttmann Construction Company*,[4] a companion case to *R. J. Smith, supra*, the Board stated that the "prehire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship: such actions may include the execution of a supplemental agreement for certain projects or covering a certain area and the hiring of employees who are usually referred by the union or unions with whom there is a prehire agreement." Thus, the Board recognized the industrial realities of the construction industry in finding that 8(f) contracts do not carry, even with union-security provisions, a presumption of majority status until such time as employees for particular projects have been hired.[5] In *David F. Irvin, et al., d/b/a The Irvin-McKelvy Company*,[6] the parties conceded, and the Board held, that by virtue of compliance with union-security provisions in an 8(f) contract the union had majority status at those projects still underway. The Board nevertheless dismissed the complaint

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[4] 191 NLRB 701, 702 (1971).

[5] More precisely until the provisions of the union-security clause have taken effect at a project (usually 7 days).

[6] 194 NLRB 52 (1971), enforcement granted in part and denied in part 475 F.2d 1265 (C.A. 3, 1973).

therein with respect to projects not yet begun at the time the employer terminated the union contract.

From the foregoing, we conclude that the contract herein is an 8(f) contract and that no presumption of majority status attaches to it in the circumstances of this case. Accordingly, the duty of Higdon Construction and its *alter ego*, Higdon Contracting,[1] to honor the Employer's collective-bargaining agreement with Local 103 is limited by the nature of 8(f) agreements. Under the doctrine set out in the cases cited above, the Employer could have terminated the agreement with Local 103 for projects not yet underway. For the Board to allow the Respondent to picket to enforce an 8(f) agreement if an employer decides to ignore it, as the Employer herein has done with respect to nonunion jobs, which Respondent could not enforce by means of obtaining an 8(a)(5) bargaining order, is to permit it to do by indirection what it could no do directly, and in effect nullify our decisions in *R. J. Smith* and its progeny that such contracts are voidable by either party if a union never thereafter obtains majority status. In these circumstances, we conclude that the picketing by Respondent to enforce a noneffective 8(f) contract was for

[1] The Administrative Law Judge found that Higdon Contracting was the *alter ego* of Higdon Construction, and the General Counsel did not except to this finding. Thus, Higdon Contracting was bound by the collective-bargaining contract of Higdon Construction and Respondent. *See Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 206 NLRB 562 (1973).

initial recognitional purposes and therefore was proscribed by Section 8(b)(7)(C) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action set forth below to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Higdon Contracting Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By picketing Higdon Contracting Company, Inc., from January 29, 1974, until March 1, 1974, at its W. R. Grace Company jobsite at Owensboro, Kentucky, with an object of forcing and requiring Higdon Contracting Company, Inc., to bargain with Respondent, without being currently certified as the representative of Higdon Contracting Company, Inc.'s employees and without a petition under Section 9(c) being filed within a reasonable period of time, Respondent engaged in unfair labor practices within the meaning of Section 8(b)(7)(C) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, Evansville, Indiana, its officers, agents, and representatives, shall:

1. Cease and desist from picketing or causing to be picketed, or threatening to picket or cause to be picketed, Higdon Contracting Company, Inc., where an object thereof is forcing or requiring said employer to recognize or bargain with it as the representative of its employees in violation of Section 8 (b) (7) (C) of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."* Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by the Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days there-

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* In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

after, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board

An Agency of the United States Government
After a trial in which all parties had the opportunity to present their evidence, it has been decided that we violated the law by picketing or causing to be picketed, or threatening to picket or causing to be picketed Higdon Contracting Company, Inc., where an object thereof was to force or require the said Employer to recognize or bargain with us as the representative of its employees in violation of Section 8(b)(7)(C) of the Act. We have been ordered to post this notice. We intend to carry out the Order of the Board and abide by the following:

> WE WILL NOT, under conditions prohibited by Section 8(b)(7)(C) of the Act, picket or cause to be picketed, or threaten to picket or cause to be picketed, Higdon Contracting Company, Inc., where an object thereof is to force or require the said Employer to recognize or bargain with us as the representative of its employees.

LOCAL UNION NO. 103,
INTERNATIONAL
ASSOCIATION OF BRIDGE,
STRUCTURAL AND
ORNAMENTAL IRON
WORKERS, AFL-CIO

DECISION

Statement of the Case

LOWELL GOERLICH, Administrative Law Judge: The charge filed by Higdon Contracting Company, Inc., herein referred to as Higdon Contracting, against Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, the Respondent herein, sometimes referred to as the Union, on March 6, 1974, was served on the Respondent by registered mail on or about March 6, 1974. A complaint and notice of hearing was issued on April 25, 1974. The complaint charged that the Respondent violated Section 8(b)(7)(C) of the National Labor Relations Act, as amended, herein referred to as the Act, in that the Respondent picketed certain jobsites, with the object of forcing and requiring Higdon Contracting to recognize the Respondent as the collective-bargaining representative of its employees and the employees of Higdon Contracting to accept the Respondent as their collective-bargaining representative when at the time of said picketing the Respondent was not certified as the bargaining representative of the employees of Higdon Contracting nor had the Respondent filed a valid petition under Section 9(c) of the Act within a reasonable time from the commencement of such picketing.

The Respondent filed a timely answer denying that it had engaged in any of the unfair labor practices alleged.

The case was submitted pursuant to the following stipulation:

> The [parties hereto] hereby agree as follows:
>
> 1. All parties hereby waive all rights to the holding of a hearing before an Administrative Law Judge.
>
> 2. The case shall be submitted to an Administrative Law Judge for decision and issuance of decision, and the following shall constitute the record in this case, copies of which are attached hereto and made a part hereof:
>
> a. The complaint, marked Attachment A, which was timely served on all parties.
> b. The answer, marked Attachment B, which was timely served on all parties.
> c. The order postponing the hearing, marked Attachment C, which was timely served on all the parties.
> d. The order indefinitely postponing the hearing, marked Attachment D, which was timely served on all parties.
> e. The transcript (including the exhibits) of a hearing before District Judge Gordon on May 6, 1974, concerning the above case, marked Attachment E. [The parties hereto agree that references in the transcript to "VII" should read "8."]
> f. The petition for injunction in Civil No. C74-420, marked Attachment F.
>
> 3. The parties do not necessarily concede the relevance of all facts above recited, and any party urging irrelevance will do in a brief to the Administrative Law Judge.

> 4. The privilege of filing a brief to the Administrative Law Judge is expressly reserved by all parties hereto, said briefs to be due by a date to be set by the Administrative Law Judge.

All briefs have been carefully considered.

Findings of Fact, Conclusions, and Reasons Therefor

I. The business of the charging party

Higdon Contracting is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Kentucky.

At all times material herein, Higdon Contracting has maintained its principal office and place of business at Owensboro, Kentucky, herein called the facility, and various other facilities and jobsites in the States of Kentucky and Indiana, and is, and has been at all times material herein, engaged at said facilities and jobsites as a general contractor in the construction contracting industry.

During the past year, a representative period, Higdon Contracting in the course and conduct of its business operations purchased, transferred, and delivered to its Kentucky facilities and jobsites goods and materials valued in excess of $50,000 which were transported to said facilities and jobsites directly from States other than the State of Kentucky.

During the past year, a representative period, Higdon Contracting in the course and conduct of its

business operations performed services valued in excess of $50,000 in States other than Kentucky wherein Higdon Contracting is located.

Higdon Contracting is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Facts*

The Union caused pickets to be placed at the W. R. Grace Chemical jobsite in Owensboro, Kentucky, where the Higdon Contracting was performing construction work on January 29, 1974. Pickets remained at the site, except during periods of inclement weather (about 4 or 5 days), until March 1, 1974. The picket sign carried bore the legend:

> Higdon Construction Company is in violation of the agreement of the Iron Workers Local Number 103

The Union also picketed with a similar sign on March 4, 5, 18, 19, and 20, 1974, at the Barmet jobsite at Rockport, Indiana, where Higdon Contracting was also performing work.

On July 7, 1973, the Higdon Construction Company, herein referred to as Higdon Construction, recognized the Union and accepted and approved the current labor agreement between the Tri-State Iron Workers Employees Association, Inc., and the International Association of Bridge, Structural and Ornamental Iron Workers, Local 103, terminating on March 31, 1976. The agreement was signed by Gerald J. Higdon for Higdon Construction. At the time this agreement was signed Higdon Construction had executed a construction contract dated May 7, 1973, calling for construction work at the Glenmore Distilleries Company in Owensboro, Kentucky. An article of the contract provided:

> It is understood and agreed as a material part and as a consideration for this contract that Contractor [Higdon Construction Company, Inc.] as well as any sub-contractor or assignee hereunder, shall use union labor exclusively in the performance of this contract.

Higdon maintained that he entered into the labor agreement with the Union "reluctantly, against my will." He explained that in order to comply with his agreement with Glenmore Distilleries Company he had asked for employees through the Union. The Union refused to furnish employees. Nevertheless, when Higdon determined to continue without union labor, the Carpenters and Operating Engineers "entered into it." Said Higdon: "They came up and shut my job down and there was talk about a walk out of the Distillery. So, their manager came to me

and told me that something would have to be done. Well, when the final shut down came, uh, well, I—I just lost my cool and I went and signed their contracts." The contract does not contain a union-security clause or any checkoff provisions.

Thereafter in July 1973 Higdon incorporated the Higdon Contracting Company, Inc., the Charging Party herein. Higdon is the sole stockowner of both Higdon Contracting and Higdon Construction and the president of both companies. His son is secretary-treasurer of both companies. The directors are the same. Equipment is being leased from one company to the other.[1] Trucks used by Hidgon Contracting on the Grace Company jobsite bear the name of Higdon Construction. Indeed an invoice dated 3/8/74 reveals that material for a building in the amount of $96,788 intended for the Rockport, Indiana, site was charged to Higdon Construction.

In February 1974 when Union Representative William Oglesby asked Higdon "what was going on" at the Grace Company site, Higdon replied that a new company had been set up. He continued, "they had, uh, forced me into signing this agreement at the Glenmore Distillery that I had to do something because, uh, I have a lot of competition that is not non-union. . . ." When Oglesby attempted to "sign-up" the new company Higdon responded that "this would

[1] Higdon testified, "Well Higdon Construction Company is the only one that has any par value at all and, uh, therefore it would own the equipment, once it is paid for and, uh, we lease it to the Higdon Contracting Company."

be kind of silly for me to do this because it would defeat the purpose I had started out to do . . . ." Higdon frankly admitted "it's one and the same companies . . . under one hat or another hat, depending on whether [he was] doing Union work or non-union work . . . ."[2]

After Hidgon refused to honor the above-mentioned labor agreement the Union placed the pickets as above detailed.

Neither at the time the contract was executed nor thereafter did the Union represent a majority of the employer's employees within an appropriate unit.

B. *Conclusions and Reasons Therefor*

The contract executed by Higdon Construction and the Union on July 7, 1973, satisfied the lawful requirements for a prehire agreement authorized by Section 8(f) of the Act.[3] Nevertheless, the General Counsel apparently asserts, as his major premise,

[2] When Higdon informed Union Representative Oglesby that Higdon Construction did not have a contract with W. R. Grace Company, according to Higdon, Oglesby said that "we were in violation of contract and that we should get a lawyer because we would have to go to court with 'em."

[3] The employer was "engaged primarily in the building and construction industry"; the employees covered by the agreement were "engaged (or who, upon their employment, [would] be engaged) in the building and construction industry"; and the union was "a labor organization of which building and construction employees [were] members (not established, maintained, or assisted by any action defined in section 8(a) of [the] Act as an unfair labor practice. . . ."

that the contract, "an 8(f) agreement," had no prospective validity requiring the employer to adhere to its terms because at no time after it was executed did the Union represent a majority of the employer's employees in an appropriate unit. Thus, reasons the General Counsel, it follows that, in the absence of a valid contract, the Union's picketing aimed at the employer's violation of a noneffective contract was for initial recognitional purposes proscribed by Section 8(b)(7)(C). The General Counsel's major premise is drawn from the Board's holding in *R. J. Smith Construction Co., Inc.*, 191 NLRB 693 (1971). In this case a majority of the Board held "that a prehire agreement, although validly executed for a fixed term of years, is effective only so long as both parties wish to adhere to it and may be ignored with impunity . . . by either party at any time without thereby offending either Section 8(a)(5) or Section 8(b)(3) of the Act" [4] if the Union has not previously established a majority.[5] The facts in that case

[4] This language is taken from the dissent.

[5] This proposition of law was reversed by the Court of Appeals for the District of Columbia, 480 F.2d 1186 (1973). The court held that "an employer, who has entered into a validly executed prehire agreement may, after a reasonable period, seek a representation election to challenge an enduring minority union, but until he does and prevails, he should be held to the same standard of conduct in regard to unfair labor practices as an employer who has entered into a collective-bargaining agreement with a union certified to have majority status." On remand, 208 NLRB 615 (1974), the Board applied the court's views. In a footnote it was noted, "Member Fanning agrees with the court's decision. Chairman Miller

disclose that the employer, while he executed 8(f) agreements, did not intend and never did abide by their terms. Moreover, during the period of the agreements, without prior notice or bargaining with the union, the employer raised wages of certain employees covered by the agreement.

The facts in the instant case differ. Here the terms of the contract were implemented. Employees were supplied by the union and wages and contributions to the welfare fund were paid according to the contract. There is no persuasive evidence that the Employer actually repudiated the contract. On the other hand, the evidence is that the Employer sought to adhere to the contract for union work (such as the Glenmore Distilleries contract) and to avoid it as to nonunion work by the creation of a second corporation as a subterfuge and a sham. This blow hot, blow cold stance of the Employer,[6] which contem-

reserves opinion as to the underlying legal issues. . . ." While I adhere to the reasoning of the court and the dissent, I deem myself bound by the Board's decision. *Insurance Agents' International Union, AFL-CIO*, 119 NLRB 768, 772-773 (1958).

[6] The record indicates that Higdon was the real employer, the alter ego of Higdon Construction and Higdon Contracting, a single integrated business entity. See *J. Howard Jenks, d/b/a Glendora Plumbing*, 165 NLRB 101 (1967); and *Industrial Fabricating Inc.*, 119 NLRB 162 (1957). Higdon admitted that Higdon Contracting and Higdon Construction were "one and the same."

In *Bricklayers, Masons and Plasterers' Union, Local No. 1*, 209 NLRB 820 (1974), it was stated by the Administrative Law Judge:

[Footnote continued on page 34a]

plated an adherence to the contract for some purposes, was not of such character as to render the Union's picket line vulnerable to Section 8(b)(7)(C).[7] Not all picketing which continues for more

---

[6] [Continued]

Where an individual is the sole owner of a corporation, the Board has consistently ignored the corporate fiction and has considered one as the alter ego of the other. *Diaper Jean Manufacturing Company*, 109 NLRB 1045 (1954); *Industrial Fabricating Inc.*, 119 NLRB 162, 169 (1957), enfd. 272 F.2d 184 (C.A. 6, 1959); *Ogle Protection Service, Inc. and James L. Ogle*, 149 NLRB 545, 546 (1964), fn. 1, modified in other respects 375 F.2d 497 (C.A. 6, 1967).

[7] Sec. 8(b)(7)(C) reads as follows:

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

* * * *

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

than 30 days without filing a representation petition runs afoul of Section 8(b)(7)(C). *Local Union No. 741, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO*, 137 NLRB 1125 (1962). Only picketing is banned where an object of such picketing is to require an employer to "recognize or bargain" with a labor organization or to require the employees "to select such labor organization as their collective bargaining representative." In the instant case the object of the picketing as indicated by the picket sign was to inform the world that the Employer was in violation of an agreement with the Union. Since there is no persuasive evidence that the Employer, who had recognized the Union, intended to terminate the contract *in toto* but only sought by subterfuge and chicanery to avoid its application for nonunion work[8] while adhering to the contract for union work, the picket legend published the truth. The target of the Union's picketing was not to force or require the Employer to initially accept the Union as the bargaining representative, since that had already been accomplished, but to se-

---

[8] Higdon testified, "in order to, uh, get around the contract, as you put it, uh, to be able to bid with my competition, yes."

cure compliance with an existing contract, a permissible objective.

In *Bay Counties District Council of Carpenters, AFL-CIO, et al.*, 154 NLRB 1598, 1605 (1965) the Board said:

> We have held in previous cases that Section 8(b)(7)(C) is not to be literally applied so as, for example, to reach picketing by a recognized union to secure compliance with an existing contract, since the section was
>
> > intended to proscribe picketing having as its target forcing or requiring an employer's *initial* acceptance of the union as the bargaining representative of his employees. [Emphasis supplied.]

(Citing *Building and Construction Trades Council of Santa Barbara County, AFL-CIO, et al. (Sullivan Electric Company)*, 146 NLRB 1086, 1087 (1964).) Thus, the Union's picketing did not come within the proscription of Section 8(b)(7)(C). Moreover, the conclusion that the picketing was legal activity is strengthened by the proviso to Section 8(b)(7)(C) since the legend used was pointed at an employer who failed to apply a union contract.

[Recommended Order omitted from publication.]

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 224221 33

Supreme Court, U. S.
FILED
MAY 5 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-719

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 22, 1976
CERTIORARI GRANTED FEBRUARY 22, 1977

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-719

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

IN THE MATTER OF:

LOC. UNION NO. 103, INT'L ASSOC. OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL-CIO

Case No.: 25-CP-63-2

3.6.74 Charge filed

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4.25.74 Complaint and Notice of Hearing

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6.21-74 Stipulation entered into by all parties

8.23.74 Administrative Law Judge Lowell Goerlich's Decision issued

9.17.74 General Counsel's Exceptions, received

1.6.75 Decision and Order issued by the National Labor Relations Board

3.31.76 Decision of Court of Appeals

3.31.76 Judgment of Court of Appeals

6.25.76 Petition for Rehearing and rehearing en banc denied

2.22.77 Order of Supreme Court granting certiorari

NLRB-502
(12-67)

Form Approved
Budget Bureau No. 64-R0012

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 25-CP-63-2

Date Filed March 6, 1974

1. LABOR ORGANIZATION OR ITS AGENT(S) AGAINST WHOM CHARGE IS BROUGHT

a. Name	b. Local Representative to Contact	c. Phone No.
Bridge, Structural and Ornamental Iron Workers Local # 103	Charles Hill	

d. Address (Street, city, State and ZIP code)

5313 Old Boonville Hwy, Evansville, Indiana

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) 7 (List Subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

The above Labor Organization action in concert with others, has picketed Higdon Contracting Company, Inc. in excess of fourty (40) days without seeking an election through the NLRB. Further that such picketing is for recognitional purposes as evidenced by the unions conduct on the picket line and their picket sign language.

3. Name of Employer
Higdon Contracting Company, Inc.

4. Location of Plant Involved (Street, city, State and ZIP code)
616 Breckenridge St., Owensboro, Ky.

5. Type of Establishment (Factory, mine, wholesaler, etc.)	6. Identify Principal Product or Service	7. No. of Workers Employed
Construction		13

8. Full Name of Party Filing Charge
Blankenship & Williams

9. Address of Party Filing Charge (Street, city, State and ZIP code)	10. Telephone No.
P. O. Box 27194, Indianapolis, Indiana 46227	317-784-7851

11. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By _____ Blankenship & Williams
(Signature of representative or person making charge) (Title or office, if any)

Address P. O. Box 27194, Indianapolis, Ind. 784-7851 Mar. 5, 1974
(Telephone number) (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 862-496

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Case No. 25-CP-63-2

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO

and

HIGDON CONTRACTING COMPANY, INC.

COMPLAINT AND NOTICE OF HEARING

It having been charged by Higdon Contracting Company, Inc., herein called Higdon, that Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, herein called the Respondent, has engaged in, and is engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Acting Regional Director for Region Twenty-five, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations—Series 8, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. The original charge was filed by Higdon on March 6, 1974 and served on the Respondent by registered mail on or about March 6, 1974.

2. (a) Higdon is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Kentucky.

(b) At all times material herein, Higdon has maintained its principal office and place of business at Owensboro, Kentucky, herein called the facility, and various

other facilities and jobsites in the States of Kentucky, and Indiana, and is, and has been at all times material herein, engaged at said facilities and jobsites as a general contractor in the construction industry.

(c) During the past year, a representative period, Higdon, in the course and conduct of its business operations, purchased, transferred, and delivered to its Kentucky facilities and jobsites, goods and materials valued in excess of $50,000.00 which were transported to said facilities and jobsites directly from States other than the State of Kentucky.

(d) During the past year, a representative period, Higdon, in the course and conduct of its business operations, performed services valued in excess of $50,000.00 in States other than Kentucky wherein Higdon is located.

(e) Higdon is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Respondent is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

4. At all times material herein, the following-named person occupied the position set opposite his name, and has been and is now an agent of the Respondent, acting on its behalf, and is an agent within the meaning of Section 2(13) of the Act:

Charles Hill—Business Agent

5. (a) On or about January 29, 1974, the Respondent commenced picketing Higdon and caused said employer to be picketed at the W. R. Grace Company jobsite, Owensboro, Kentucky and at other jobsites in Kentucky and Indiana.

(b) The Respondent engaged in the activity described in paragraph 5(a), above, an object thereof being to force and require:

(i) Higdon to recognize and bargain with the Respondent as collective-bargaining representative of the employees of Higdon; and

(ii) The employees of Higdon to accept the Respondent as their collective-bargaining representative.

(c) The Respondent, at the time it engaged in the activity described in paragraphs 5(a) and (b) above, was not, and is not now, currently certified as the representative of the employees of Higdon.

(d) The Respondent engaged in the activity described in paragraphs 5(a), (b) and (c) above, without a valid petition under 9(c) of the Act involving employees of Higdon having been filed within a reasonable period of time from the commencement of such picketing.

6. The acts of the Respondent described in paragraph 5 above, occurring in connection with the operations of Higdon described in paragraph 2 above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

7. The acts of the Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(b)(7)(C) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 29th day of May, 1974, at 10:00 a.m. (CDT), at the Division I Courtroom, Second Floor, Daviess County Courthouse, Owensboro, Kentucky, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB 4668, Statement of Standard Procedure in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice cases, is attached.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Acting Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to said Complaint within ten

(10) days from the service thereof and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its answer, the Respondent shall serve a copy thereof on each of the other parties.

DATED AT Indianapolis, Indiana, this 25th day of April, 1974.

/s/ George M. Dick
GEORGE M. DICK
Acting Regional Director
National Labor Relations Board
Region Twenty-five
6th Floor, ISTA Building
150 West Market Street
Indianapolis, Indiana 46204

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Case No. 25-CP-63-2

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO

and

HIGDON CONTRACTING COMPANY, INC.

ANSWER

Respondent Union, Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, by its attorneys, Berger and Berger, for its answer to the complaint herein, Case No.25-CP-63-2, states as follows:

1. It admits the allegations contained in rhetorical paragraphs 1 and 3 of the complaint.

2. It is without knowledge as to the allegations contained in rhetorical paragraphs 2(a), 2(b), 2(c), 2(d), and 2(e) of the complaint, and therefore denies same.

3. It denies the allegations contained in rhetorical paragraphs 4, 5(a), 5(b)(i), 5(b)(ii), 5(c), 5(d), 6 and 7 and each and every other allegation in said complaint not herein specifically admitted.

WHEREFORE, Respondent Union prays that the complaint herein, Case No. 25-CP-63-2 be dismissed and for all other proper relief.

Dated at Evansville, Indiana, this 29 day of April, 1974.

BERGER AND BERGER
18 Court Building
Evansville, Indiana 47708

By /s/ Charles L. Berger
Attorneys for Respondent
Union

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Case No. 25-CP-63-2

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO

and

HIGDON CONTRACTING COMPANY, INC.

STIPULATION

The undersigned parties hereby agree as follows:

1. All parties hereby waive all rights to the holding of a hearing before an Administrative Law Judge.

2. The case shall be submitted to an Administrative Law Judge for decision and issuance of decision, and the following shall constitute the record in this case, copies of which are attached hereto and made a part hereof:

a. The complaint, marked Attachment A, which was timely served on all parties.

b. The answer, marked Attachment B, which was timely served on all parties.

c. The order postponing the hearing, marked Attachment C, which was timely served on all the parties.

d. The order indefinitely postponing the hearing, marked Attachment D, which was timely served on all parties.

e. The transcript (including the exhibits) of a hearing before District Judge Gordon on May 6, 1974,

concerning the above case, marked Attachment E.*

f. The petition for injunction in Civil No. C74-420, marked Attachment F.

3. The parties do not necessarily concede the relevance of all facts above recited, and any party urging irrelevance will do so in a brief to the Administrative Law Judge.

4. The privilege of filing a brief to the Administrative Law Judge is expressly reserved by all parties hereto, said briefs to be due by a date to be set by the Administrative Law Judge.

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO

By /s/ Sydney Berger — Dated 6-19-74

HIGDON CONTRACTING COMPANY, INC.

By /s/ Ray Blankenship — Dated 6-18-74

GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD

By /s/ Arthur G. Lanker — Dated 6-21-74

* The parties hereto agree that references in the transcript to "VIII" should read "S."

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

Civil Action No. 74-42-0

[Received June 24, 1974, Div. of Judges, NLRB, Wash, D.C.]

GEORGE M. DICK, Etc., for and on behalf of the National Labor Relations Board, PETITIONER

v.

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, RESPONDENT

TRANSCRIPT OF PROCEEDINGS

BEFORE HONORABLE JAMES F. GORDON, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF KENTUCKY, AT OWENSBORO, KENTUCKY, ON MONDAY, MAY 6, 1974, WITHOUT A JURY.

APPEARANCES:

For Petitioner:

Arthur G. Lanker, Esq.
Indianapolis, Indiana

For Respondent:

Sydney L. Berger, Esq.
Evansville, Indiana

• • • •

[3] THE CAPTIONED MATTER WAS CALLED BY THE COURT CLERK AT ABOUT THE HOUR OF 9:40 A.M. ON MONDAY, MAY 6, 1974, AND THE FOLLOWING PROCEEDINGS OCCURRED:

• • • •

[4] MR. LANKER: Your Honor; may it please the Court; I will briefly set out the relevant facts which we will prove to support our position in the petition for injunctive relief.

• • • •

[6] While contracts with the minority unions are permissible under VIII(f) ofthe NLRB Act if entered into voluntarily, such contracts may with impugnity thereafter, be ignored by the employer and they do not bar a petition for an election under the Act.

• • • •

[15] MR. WILLIAM OGLESBY, CALLED AS A WITNESS, BY THE PLAINTIFF, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS, TO WIT:

DIRECT EXAMINATION

By Mr. Lanker:

Q Will you state your name and address?
A My name is William Oglesby. I live at 1925 Audubon Drive, Evansville, Indiana.
[16] Q And are you employed?
A Yes Sir; I am.
Q By whom?
A By Ironworkers Local 103.
Q And in what capacity?
A I am a financial secretary-treasurer and Business Agent of Iron Workers Local 103.
Q And have been since when?
A Since June of '72.

MR. LANKER: May it be stipulated that this gentleman was an agent of Local 103 Iron Workers; may it be so stipulated?
MR. BERGER: We do so stipulate.
MR. LANKER: I would request permission to interrogate by leading questions pursuant to Rule 43(b), Your Honor.
BY THE COURT: All right.
Q Now, you are familiar, are you not, with a W. R. Grace Chemical job site in Owensboro, Kentucky?
A Yes Sir; I am.
Q Loca! 103 Iron Workers picketed that job site in 1974; isn't that correct?
[17] A Yes Sir.
Q And it was picketing at that job site?
A Picketing—I'm sorry, Sir?
Q Who was it picketing?
A It was picketing the Higdon Construction Company in violation of the agreement with the Iron Workers Local 103.
Q You had been informed that Higdon Construction Company was performing the contract though, had you not?
A Uh, I was informed by a Mr. Kelly that Higdon Construction Company was doing the work; Higdon, uh, or,—No Sir; I wasn't informed of that particular thing: I was informed that another company was to do the work on the job.
Q Didn't Mr. Kelly tell you it was Higdon Contracting Company?
A No Sir; when I contacted Mr. Kelly he said it was going to be performed by a non-union contractor, a subcontractor.
Q Now, from the time that your Union commenced the picketing at the W. R. Grace Chemical site isn't it true that between that time and [18] the time that you ended your picketing more than thirty days elapsed? your picketing more than thirty days elapsed?
A Sir, uh, to the best of my knowledge and records, we began picketing January 7th and it ended sometime

February 15th, but no time was the picketing continuous due to the inclement weather; no one was performing work at the particular job, so we did not picket the job continouusly during that period of time.

Q Is it possible that you are a little bit mistaken on when the picketing started; whether it was in early January or late January?

A To the best of my knowledge, Sir, and my records at the Union Hall, January 7th, it commenced January 7th until around February 15th—ended around February 15th.

Q And during that time the signs that your Union used in this picketing was as follows:

> "Higdon Construction Company is in violation of the agreement of the Iron Workers Local Number 103."

Isn't that true; isn't that the sign you used?

[19] A Yes Sir; I believe that is the correct wording.

Q And you used that at all times?

A Yes.

Q And I believe that you testified that on some of the occasions that you didn't picket that was because there was inclement weather?

A No work was being performed.

Q And no work was being performed by Higdon, whether it be Higdon Construction or Higdon Contracting, no work was being performed by one of those two corporations; is that what you are saying?

A Yes Sir.

Q Now, is it true that your Union also picketed at the Barmet job in Rockport, Indiana on March 3rd—strike that, March 4th, 5th, 18th, 19th and 20th of 1974?

A Uh, Yes Sir; that, according to our records is true. I would like to add that that's really not in my jurisdiction. I am not exactly certain on that.

Q But you are certain that [20] that is what the Union's records reflect?

A Yes.

Q And you have examined them, have you not?

A Yes Sir.

Q And you have no reason to disbelieve that those are correct, do you?

A I'm sorry?

Q You have no reason to disbelieve the accuracy of your records?

A I believe they are—the dates are correct; yes Sir.

Q And the signs used during that period of picketing at the Barmet job were the same as the one that was used at the W.R. Grace Chemical job site?

A I can only say, Sir, that just one day that I know of, particularly, was the sign used as we used on the Grace Chemical Company job.

Q Your Union never had a majority of Iron Workers employees of Higdon Construction Company Incorporated, did it?

A What job are you referring to?

[21] Q At any time; your—anytime that your Union has been in existence and Mr.—the Higdon Construction Company Incorporated has been in existence, your Union has not had a majority of all Iron Worker employees working on any given date?

A Yes Sir; we have had.

Q All right; what date would that be?

A Let's say during the month of August, 1973 at the Glenmore Distillery job.

Q During the month of August?

A Yes Sir.

Q And I assume that you are referring to the week of August 16, 1973; is that correct?

A I can't recall the exact date, Sir.

Q Well, do you contend that it was for more than one week?

A Yes Sir; it was for more than one week.

Q All right; what other weeks?

A Uh, may I refer to my records; I have them in my pocket?

[22] Q Sure.

A Sir, on August 6, we had, uh, representative Iron Workers Local 103 working for the Higdon Construction Company.

Q On August 6th.

A And—uh,—

Q How many did you have employed?

A Maybe August 16th,—

Q (interrupt) How many did you have employed; how many members of Local 103 on August 6th did you have employed by Higdon, either Higdon Construction or Higdon Contracting or both?

A According to the Health and Welfare reports that I have here, Sir it's Bobby D. Bivins, Michael Hape, James Huchens, Joseph Lemham was, uh, James Miller and G.O. Rogers; that pay period ended 8-2-73, 8-9-73, 8-16-73, 8-23-73.

Q Well now, in an effort to assist you, Mr. Oglesby, don't the records that you are referring to reflect that the only persons for whom Health and Welfare was paid for the week ending August 2nd, of 1973 were Mr. Hape, for whom twenty-eight hours of Health and Welfare were paid; Joseph [23] Lemham, for whom thirty-two hours of Health and Welfare were paid, James T. Miller, for whom thirty-two hours of Health and Welfare paid and G.O. Rogers, for whom thirty-two hours of Health and Welfare were paid; isn't that the fact, Sir?

A Sir, are you looking at the same records I am? Somebody—I'm looking at the one dated August 1973, uh, Bobby D. Bivins, total nine hours, Michael Hape, 111 hours, Huchens, total of eight hours, Lemham, 128 hours, Miller, 152 hours and G.O. Rogers, 152 hours.

We have a total of 560 hours, for a total on the Welfare Fund—total payment was $224 and, uh, income was $280, my record here.

Q All right; are you familiar with the record that you now have in your hand and with its preparation, for example are you familiar with the recitation where it says concerning the payroll period ending and then it refers to columns?

A By—here—yes, right; 8-2-73, 8-9-73, 8-16-73, 8-23-73 and 8-30-73.

Q Okay.

A Now, there was the total hours for the month of August.

[24] Q Right; and during the week, for example of 8-2-73 this records shows, does it not, that there were no employees for whom Health and Welfare benefits were paid?

A For what week was that, Sir?

Q August 2nd.

A According to this it has August 2nd of '73, yes, for the pay period ending—now, this is a monthly record and the contractors put the week ending, pay period ending here, here and here and here (indicating), so forth.

So then, they put the total hours here (indicating) and sent it in on a monthly basis.

Q So, this document really is prepared by someone else and so you are not too familiar with it?

A This is prepared by the construction company.

Q But you don't know, for example, that when they say that column one refers to August 2nd, your testimony is that when there is nothing in column one, that that—what do you think that means when—

A (interrupt) Oh, I understand [25] what you mean by that column—the first column; yes Sir.

Q Yes, that that's for the week ending August 2nd of '73?

A Right.

Q And there are no employees for whom Health and Welfare were paid?

A For the—for that first column, evidently not; no Sir. It could have been—the pay period could have been different, you know, following up on another pay period; I'm not sure.

Q All right; for the week ending August 9th of 1973, uh, this record shows that there were four employees for whom Health and Welfare payments were made to Local 103; is that correct?

A Yes Sir.

Q And isn't it true that of those four, two were not members of Local 103 Iron Workers?

A Uh, that is correct, Sir, insofar as these other people was referred out from one of the—

Q They were referred out, but they were referred out on a permit.

[26] A Yes.

Q And, as such, they were not members of Local 103; is that correct?

A Yes Sir.

Q All right. Now, in the following week there are a total of six persons, uh, are there not for whom Health and Welfare payments were made, the week ending August 16, 1973?

A Four again, Sir, right; 8-16, column three, right here, one, two, three, four, five, six,—correct.

Q All right; there were six, of whom two were not members of Local 103; is that correct?

A Yes Sir; it is Lemham and Rogers.

Q And isn't it true that Mr. Bivins and Mr. Huchens did not work on the same day or even the same week of the week ending August 16, 1973?

A The only thing I can quote you, Sir, is what the column says here. All we do is just dispatch the men out and what exact days they worked are not here is up to the contractor and if they [27] don't happen to work certain days, they notify you, but I don't know exactly what days worked or did not work.

Q Okay, now, directing your attention then to the week ending August 23rd, again there were four employees for whom Health and Welfare payments were made; is that correct?

A Yes Sir.

Q Of whom two were and of whom two were not members of your Union; is that correct?

A Yes Sir.

Q And again on the week ending August 30th, the same four employees were employed and the Health and Welfare payments made for that?

A Yes Sir.

Q And, well now, other than this time, do you contend that there was any other time that your Union was

representing a majority of either Higdon Construction Company's employees or Higdon's Contracting Company's employees?

A The only thing, Sir, I can testify to is what has happened since I have been a business agent of Local 103. Prior to that date I [28] can not suggest anything.

We have been—we have had a contract since 1965. I am certainly not aware of whom he hired or who he did not hire; I'm not aware of it at all.

Q So, the answer is you don't know?

A Prior to my election; no Sir.

Q Now, at the time in August of 1973 when you referred certain men to—these were all referred to the Glenmore site or the W.R. Grace—strike that; the Glenmore site; is that correct?

A Yes Sir.

Q And at that same time in August of 1973 you knew, did you not, that Higdon Construction Company employed other Iron Working employees other than those we have talked about; you knew that, didn't you?

A Yes Sir; I did.

Q You knew that they were not members of your Union?

A I know he used people performing Iron Worker's work, right.

Q And they were not members of [29] your Union?

A And he asked would it be all right to use these people during this term and I said we would be glad to work with them.

Q And he did use these other non-Union people, did he not?

A Uh, yes Sir; he did.

Q And, for example, you don't claim that Carl Millander is a member of your Union, do you?

A I don't know him Sir.

Q Or Ronald Hubbard?

A No Sir; I don't know him.

Q Or Jerry Higdon?

A I know Jerry.

Q But he's not a member of your Union?
A He is a former member of Local 103; yes Sir.
Q Well, when did his membership end?
A Oh, sometime in '72.
Q John Phillips was not a member of your Union, was he?
[30] A No Sir. Where was he working?
Q Pardon?
A Where was he working?
Q At the Owensboro Recreation Center.
A No.
Q He was not a member was he?
A (witness shook head negatively.)
Q Raymond Nix was not a member?
A No Sir.
Q And you knew that during August employees that I have named to you were employed by Higdon Construction Company in Iron Working duties?
A These people that you just named to me?
Q Yes.
A No Sir; I don't know them from Adam. I knew that he had people employed by 'em, but not those particular people or those particular names.
Q Other than those persons, Miller, Hape, Bivins, Huchens, were there any others [31] that you contend worked at anytime in 1973 for Higdon Construction Company or for Higdon Contracting Company who were members of your Union?
A There was Higdon Construction Company; there were two other members, uh, I believe it was Clayton Smith and William Adlach.
Q What is the last name?
A Adlach, but I'm not sure about Mr. Adlach; I will have to check his records.
Q But other than those, we covered all those that you know of that worked for Higdon Construction or Higdon Contracting who were members of your Union?
A At Glenmore Distillery; yes Sir.
Q At any job, I am asking about; at any job anywhere in 1973?

A That's the only members that we had working for 'em, as far as to my knowledge; yes Sir.
Q Local 103 Iron Workers has not filed any petition with the National Labor Relation Board seeking an election of the employees of either Higdon Contracting Company Incorporated or Higdon [32] Construction Company Incorporated, has it?
A No Sir; we have a contract with Higdon Construction Company.
MR. LANKER: I am going to move to strike that as not responsive, commencing with the word "no".
BY THE COURT: Well, I am going to overrule that. I understand the theory of his defense.
Q And these companies, Higdon Contracting Company Incorporated, nor Higdon Construction Company Incorporated, neither one of them, to your knowledge, has filed a petition for an election, have they?
A Not to my knowledge, Sir.
Q Now, your Union, Local 103 Iron Workers, did file charges alleging that Higdon Construction Company, Incorporated, Higdon Contractors, Gerald Higdon owner and Gerald Higdon, doing business as Higdon Contractors, violated Section VIII(a), (1) (3) and (5) of the Act; isn't that correct?
A I believe that is true.
Q And those charges were dismissed by the National Labor Relations Board on [33] August 25, 1974; isn't that correct? (sic)
MR. BERGER: We so stipulate. He wouldn't know the date because I got it; we so stipulate.
MR. LANKER: Thank you. I have nothing further on direct, Your Honor.
MR. BERGER: I have a few questions.
BY THE COURT: All right.

CROSS EXAMINATION

By Mr. Berger:

Q Since you were asked about charges, Mr. Oglesby, would you please—please mark this as Respondent's exhibit A and A-1.

(Whereupon two documents were marked for identification as Respondent's Exhibit A and Respondent's Exhibit A-1.)

MR. LANKER: May I interrupt; Your Honor, I understood that I misspoke on the stipulation; it should have been April—it was missed in April.

BY THE COURT: I think you [34] said August.

MR. BERGER: I didn't—I took your word on the date.

MR. LANKER: I meant to say August—there, I did it again; I meant to say April of 1974.

MR. BERGER: Thank you; we so stipulated, as amended. I didn't have the date.

Q Mr. Oglesby, I show you what has been marked as Respondent's Exhibit A and ask you if that is a copy of a letter and that, uh, which you received from the NLRB with reference to charges filed against Local 103; that's—when I say you, I mean the Local Union.

A Yes Sir; we received those.

Q Sir?

A Yes Sir; the Local received them.

MR. BERGER: I offer in evidence Respondent's Exhibit A. That's the one dismissing the "C" charge.

MR. LANKER: We have no objection to the receipt, Your Honor.

BY THE COURT: Let it be [35] filed.

(Whereupon Respondent's Exhibit A was received in evidence.)

MR. BERGER: If I may, just briefly explain to the Court the relevance of this; the charge itself is identical with the charge which is now before the Court as a part of the Petition for Injunctive Relief.

The only difference is this is numbered differently and I direct the Court to the page three of the exhibit, which is a summary report by the Regional Director, Mr. Dick, who is Mr. Lanker's superior, stating why this charge was dismissed.

I call the Court's attention that this charge was filed by Higdon Contracting Company Incorporated and that the third sentence states:

> "This file reflects that the only purpose of the picketing was to require the employer to honor its contract with Bridge, Structural and Ornamental Iron Workers [36] Local 103."

• • • •

Q Mr. Oglesby, I could not quite hear all of your testimony. You were facing Mr. Lanker. Was I—am I correct that when you testified that—when you went over that sheet, that on August 16th there were six employees of Higdon Contracting or Higdon Construction Company and four were Union members and two were non-Union members on the job in question?

A Yes Sir; that is correct.

Q So, that time, then, the Union had a majority of employees?

A Yes Sir.

• • • •

[37] Q Uh, I will ask you for how long you have been signing contracts with Mr. Higdon, whatever the corporation name he may have used, [38] approximately.

A As far as I can go back to; as far as the Local 103's record, Sir, is 1965.

MR. BERGER: I would ask the reporter now to mark these as B and B-1 and C and C-1 for identification.

(Whereupon four documents were marked for identification as Respondent's Exhibit C and C-1 and Respondent's D and D-1.)

Q Sir, I show you what has been marked as Respondent's exhibit D and ask you to tell the Court what that is.

A It's an agreement, Sir, by and between the Tri-State Iron Workers Employees Association of Bridge, Structural and Ornamental Iron Workers Local number 103.

Q Now, I will ask you whether it is the custom of the Union that when it signs contracts with other contractors who are not a party to that original agreement that the Union has the contractor sign a white piece of paper called "Acceptance of Agreement" and a pink piece of paper [39] obligating the employer to comply with all of the provisions of that contract?

A Yes Sir; that is true and correct.

Q I will ask you whether that was done with Mr. Higdon and Higdon Construction Company Incorporated?

A Yes Sir; it was.

Q I now show you what has been marked for identification as Respondent's Exhibits B and C and ask you to tell the Court what those are?

A This is an acceptance of agreement signed by Higdon, Gerald Higdon, Higdon Construction Corporation Incorporated, witnessed by Bill Mosley.

Q Now, acceptance agreement; is that acceptance agreement which has been marked as Respondent's exhibit D?

A Yes Sir; it is.

Q And what is number "C"?

A This is an agreement where, in effect, they are responsible for paying Health, Welfare and Pension Trust Funds.

Q I see; that's for the [40] protection of the workers?

A Yes Sir; it is.

MR. BERGER: I now offer in evidence the Respondent's exhibit B, C, and D.

MR. LANKER: No objection.

(Whereupon Respondent's B, C, and D were received in evidence.)

MR. BERGER: I now ask Lee [sic] for the Record to substitute "B-1" for "B" and "C-1" for "C" and I

represent that they are photostat copies and you may compare them.

MR. LANKER: No objection.

BY THE COURT: So ordered.

• • • •

[41] REDIRECT EXAMINATION

By Mr. Lanker:

Q Now, I a little bit confused by your testimony that your Union represented a majority. I thought you told me on direct examination that you knew that Higdon had jobs besides the Glenmore job at the same time of the Glenmore job. I thought you told me that; didn't you?

A Yes Sir; I did.

Q And that he used Iron Workers on these other jobs; did you tell me that?

A I said he used people to perform Iron Workers work that was not members of ours.

Q Yeah. So, what—are you saying that at one time he had a majority—that your Union had a majority on the Glenmore job site; is that what you are saying?

A That's right.

Q But you recognize that if—that the Company, Higdon Construction Company at the same time had other Iron Worker employees who were not members of your Union?

A He had people, yes Sir; on his [42] payroll that he was having perform Iron Workers work and he was not living up to an agreement with Iron Workers Local 103, paying them substandard wages; yes Sir.

Q And this—these other employees that he employed at the same time were enough to reduce your majority status to below a majority status, isn't that correct?

A Could I explain something to you, Sir. When we have an agreement with a company they—when they have work to be performed they call the Local and ask for men and at the same time, as was stipulated awhile ago, uh, they may have a person that they want to use and we agree to that if they are qualified people.

Q Well, when you signed the contract that your counsel put in evidence, that contract covered all of Higdon's Iron Worker employees; isn't that correct, Sir?

A Supposedly, yes Sir; he—he was supposed to hire men out of the hiring hall.

Q For all of his projects?

A Yes.

Q Not just the Glenmore?

[43] A For all his Union work.

Q All of his projects?

A Work; that's right.

Q But he didn't do it?

A No Sir.

Q So that your Union did not have a majority at anytime of Higdon's Iron Workers employees; isn't that the simple fact?

MR. BERGER: If he knows.

A Well, uh, Sir? I'm sorry, Sir?

BY THE COURT: Answer it if you can.

Q Will you answer the question?

A Will you say the question again?

Q Your Union at no time had a majority of the Iron Workers employees of Higdon Construction Company?

A Well, only at the Glenmore job only, as far as I know; the other jobs I don't know how many men they had on the job.

Q But you already told us in [44] direct examination about who was or was not a member; you remember that testimony?

A Yes.

Q So that in light of that, are you now willing to concede that it is true that your Union did not at any time have a majority of the Iron Workers employees of Higdon Construction Company?

A Sir, on the Glenmore job I believe we had a representative majority of the men because they were referrd to, uh, out of our Local Union Hall, Iron Workers members with an Iron Workers permit.

Q But the permit men, we've already testified—you testified were not members?

A That's right, Sir.

Q And you testified that there were coincident—that simultaneously at the time at the Glenmore job was staffed in part by your men and in part of permit men who were members, at the same time, the same company had other Iron Workers Employees who were not members; you have conceded that haven't you?

A As far as my knowledge they had two other jobs going; yes Sir.

[45] Q And on those two other jobs at the same time there were Iron Workers employed.

A They were performing work of the Iron Workers.

Q Yeah.

A They weren't members of the Local 103.

MR. LANKER: That's what I said, okay.

THE WITNESS: Right.

• • • •

[46] MR. GERALD J. HIGDON

called as a witness, by the Plaintiff, having been first duly sworn, was examined and testified as follows, to wit:

DIRECT EXAMINATION

By Mr. Lanker:

Q Will you state your name and address, please?

A My name is Gerald J. Higdon. I live at Route 4, Stanley, Kentucky.

• • • •

Q Uh, you are president of Higdon Contracting Company Incorporated; is that right?

A That is correct.

Q And, uh, where is that corporation incorporated?

• • • •

[47] A Oh, in the state of Kentucky.

Q And when was it formed?

A It was, uh, formed in, uh, July, 1973.

Q You are also president of Higdon Construction Company Incorporated?

A Yes Sir. I am.

Q Now, in what business is Higdon Contracting Company Incorporated engaged?

A We are engaged in, uh, building construction, primarily steel, prefabricated buildings.

• • • •

[48] Q Now, I want to direct your attention to 1973; more particularly to the month of July and to ask you whether or not during that month your company, Higdon Construction Company Incorporated, had a contract to, uh, to do some work at the Glenmore Distillery?

A We did have a contract there, yes.

Q And, uh, at any time—strike the question. There is a contract entered into evidence here, an acceptance of agreement, uh, Respondent's B-1, C-1. I'll ask you to look at those. You recognize those, do you not, as documents that you signed?

A Yes, I do.

Q In July of 1971?

A Yes, I do.

Q Now, would you—

MR. BERGER: (interrupt) Excuse me; did you say July of '71?

MR. LANKER: '73.

[49] MR. BERGER: Yes Sir.

Q And would you tell the Court whether you had any conversation or conversations with any official or officials of Local 103 Iron Workers at any time in the month of July before you entered into those contracts?

A Yes, I had quite a conversation, uh, with Mr. Oglesby; matter of fact, I signed that thing reluctantly, against my will.

Q Well, what were the circumstances? What conversations did you have with him, with Mr. Oglesby?

A Well, I can't repeat some of the things I said, probably, but uh, I took the contract with the agreement with the Glenmore Distillery that I would operate the job with Union people.

They insisted on this because they didn't want any trouble in their factory among their factory people and my contract with the Union, I had just finished up a three year contract some six months before.

It—it was run out. I intended to use Union people on this job by calling for 'em out of the [50] various Unions and when I got ready for people to work I asked for 'em and they wouldn't give me any.

Mr. Oglesby, as a matter of fact, said that, uh, he would not furnish me any men unless I signed the contract.

So, uh, we proceeded to do the job, uh, without it, even though it was a little rough. We were going to try to do it. As a matter of fact, I had to sub-out some of the work to another contractor who was operating with Union people and we proceeded to go and then the Carpenters entered into the thing; the Operating Engineers entered into it.

They came up and shut my job down and there was talk about a walk out of the Distillery. So, their manager came to me and told me that something would have to be done. Well, when the final shut down came, uh, well, I—I just lost my cool and I went and signed their contracts.

Q Okay. Now, after you signed contracts with these Unions including Iron Workers Local 103, I take it that for some of your projects, Local 103 did furnish men, is that correct?

A On the Glenmore Distillery job only.

[51] Q At any time in July, 1973, either before or after the execution of this acceptance agreement, or at any time in 1973 or 1974, were there or were there not a majority of your Iron Workers employees who were members of Local 103 Iron Workers?

A No, no; definitely not.

Q Did you, at my request, prepare a compilation from your—strike the question. Did you at my request cause to be prepared a compilation showing the employees employed by your company as Iron Work employees during the period July 26, 1973, through March 28, 1974?

A I did.

MR. LANKER: Would you mark this as Petitioner's exhibit one?

(Whereupon a document was marked for identification as Petitioner's Exhibit number one.)

Q I am showing you what has been marked as petitioner's exhibit one consisting of several sheets and ask you to look at it long enough to tell the Court whether this is or is not the compilation that you testified about?

[52] A This is the compilation; the, uh, weeks in here —uh, weeks endings in here from 8-9-73, 8-16-73, 8-23-73, 8-30-73, 9-6-73; during that period I had, uh, some people that had been sent to me from Local 103, but, uh, I think that they must have about three actual members and I—we were employing at that time on Iron Work anywhere from ten to eleven people.

Q So, this compilation, this Petitioner's number one, shows not just the Glenmore Iron Workers, but the Iron Workers employed by you on all of your projects during the times shown.

A That's right.

MR. LANKER: I would offer this into evidence.

BY THE COURT: Let it be filed.

(Whereupon Petitioner's Exhibit number one was received in evidence.)

• • • •

[53] Q Now, Mr. Higdon, I want to direct your attention to the month of February, 1974, and ask you whether or not you had any conversation with William Oglesby of Local 103 Iron Workers?

A Yes, I—I had a conversation with Mr. Oglesby at that time.

Q Where did this conversation take place?

A In my office.

Q Were there others present at the time?

A My secretary was in the outer office; the door was open.

[54] Q All right; will you tell the Court what was said, please?

A Uh, I would like to correct that statement. There was another party present; there was—Mr. Bill Mosley was there with him.

Q And who is Mr. Mosley?

A Mr. Mosley is a business agent for the Carpenters.

Q All right; will you proceed and tell the Court what was said on this occasion?

A Well, they came in and asked me what I was—what I was doing.

MR. BERGER: Excuse me; we object, Your Honor. Because of the fact that he says, "They came in."

Mr. Mosley is with a different Union and since only 103 is involved here, we would ask that he state what Mr. Ogiesby said and what Mr. Mosely said separately. Obviously, they didn't both talk simultaneously.

BY THE COURT: All right; you will identify who you are quoting each time.

THE WITNESS: All right. Your Honor, uh, Mr. —uh, I'm not real sure which [55] one asked me what was going on, uh, but I proceeded to explain to 'em the reason the job was being handled at the W. R. Grace as it was under the new company's name, uh, was, due to the fact that, uh, they had, uh, forced me into signing this agreement at the Glenmore Distillery that I had to do something because, uh, I have a lot of competition that is not non-Union and I have to compete with 'em and they—uh, I feel like that they forced me into this position to go to the second company; otherwise, I'd be competing with Union people and, uh, I am just not big enough to compete with most of the Union people in this area.

When it comes to larger jobs, I am not there. I have to compete with the smaller contractors. So, I formed the second company and they couldn't understand why and I proceeded to tell 'em because of the Glenmore situation.

Q The Glenmore Distillery, you mean?

A The Glenmore Distillery, yes, yes. Then—uh, they said, "Well, all right; let's get signed up here. Let's sign up this new company."

I made the statement that this would be kind of silly for me to do this because it would [56] defeat the purpose I had started out to do and, uh, they—uh, Mr. Oglesby said, uh, "You mean you're not going to sign?"

I said, "No, I'm not going to sign."

He said, "Well, that's all for me", and he got up and he walked out and Mr. Mosley went with him.

Q Now, was Higdon Contracting Company engaged in any construction at the time of this conversation?

A We had—uh, Higdon Contracting Company had started, uh, the warehouse job at W. R. Grace Company, yes.

Q Here in Owensboro?

A Yes, in Owensboro, Kentucky.

Q Now, did Higdon Contracting Company Incorporated have any contract to perform construction at Barmet in Rockport, Indiana?

A Uh, we—uh,—we do have at this time a contract through Higdon Contracting Company with Barmet Industries in Rockport, Indiana vicinity, yes.

Q And, uh, did you see—did you ever have occasion to be at that construction site [57] there in Barmet?

A Yes, I was there daily.

Q Did you see any picketing there by Local 103 Iron Workers?

A Yes, Local—the Local Iron Workers were picketing there, uh, part of the time.

MR. LANKER: Would you mark this as Petitioner's exhibit number two?

(Whereupon a photograph was marked for identification as Petitioner's Exhibit number two.)

Q Directing your attention to the sign on Petitioner's exhibit number two and to the language on the sign, I ask you to state whether or not this is the wording that was on the sign that was used by Local 103 in picketing at the Barmet project?

A The same wording, yes.

MR. BERGER: No objection.

MR. LANKER: Offer it, Your Honor.

[58] BY THE COURT: Let it be filed.

(Whereupon Petitioner's Exhibit Number Two was received in evidence.)

MR. LANKER: I have nothing further on direct, Your Honor.

CROSS EXAMINATION

By Mr. Berger:

Q Mr. Higdon, as I understand it, you, uh, well, am I correct that after you signed this contract with Local 103 that we have mentioned, that you have identified, you found it was difficult to comply with it and so you decided to form this new company, this Higdon Contracting Company Incorporated in order to get around the contract; is that right, Sir?

A In order to, uh, get around the contract, as you put it, uh, to be able to bid with my competition, yes.

Q Yes, and this new company, Higdon Contracting Company, that was really you. I mean you are—you are the sole stock holder?

A Right.

[59] Q And you are the president of both companies, Sir?

A That's right.

* * * *

[60] Q And you are using the equipment that is owned by you under the name of Higdon Construction Company Incorporated?

A We are; and we are leasing from one company to the other.

Q I see; which company is leasing the which?

A Well, Higdon Construction Company is the only one that has any par value at all and, uh, therefore it would own the equipment, once it is paid for and, uh, we lease it to the Higdon Contracting Company.

Q So, the equipment that the Higdon Contracting Company is using is owned by the Higdon Construction Company?

A That's right.

Q Yeah, and, uh, who prepared [61] —they both have the same directors, don't they, same Board of Directors, same officers, both companies?

A Uh, yes, I am the president of both of 'em and my son is secretary and treasurer.

Q And you own all of the stock in both companies?
A Right.

• • • •

[72] MR. PHILLIP C. KELLY,

called as a witness, by the plaintiff, having been first duly sworn, was examined and testified as follows, to wit:

DIRECT EXAMINATION

By Mr. Lanker:

Q Would you state your name and address, please?
A Phillip C. Kelly, and I live at Route 3, Philpot, Kentucky.
[73] MR. BERGER: I'm sorry; I didn't get the address.
THE WITNESS: Route 3, Philpot, Kentucky.
Q Are you employed by Higdon Contracting Company Incorporated?
A Yes Sir; I am.
Q How long have you been employed by them?
A Since last July.
Q And in what capacity?
A I am the general manager of Higdon Contracting Company.
Q How long in that capacity?
A Uh, since last July I have held the title of general manager of the company and it was activated in December of '73.
Q Now, pursuant to a contract with the W. R. Grace Company in either January of 1974 or early December, 1973, did Higdon Contracting Company Incorporated commence construction on the W. R. Grace project in Owensboro, Kentucky?
A Yes Sir; we did.
Q And after you commenced that [74] did you have any contact from any official of Iron Workers Local 103?
A Yes Sir; I did.
Q From whom?
A Uh, from Mr. Oglesby.

Q And when was this, please?
A This was in, uh, January, and I don't remember the exact date, but it was around the first of January.
Q Of 1974?
A '74; yes Sir.
Q And how was that contact made?
A Mr. Oglesby called me from the guard house up at the W. R. Grace Company, uh, requesting permission to go back to the job site.
Q And what did you say to him, if anything?
A At this time I was tied up. I could not get up there and I told him, uh, such, and he said okay.
Q Did he ever get back to you on the same matter?
A Yes, he did. Mr. Oglesby and Mr. Mosley called again from the guard house. I'm not [75] which one I talked to, uh, the second time.
Q What happened this time?
A This time, again they wanted to go back in there and, again, I could not get up there. It's up, uh, about three miles up there and by the time you run up there and run back, uh, I have wasted quite a bit of time and, uh, it's—these people request us to, uh, escort anyone who goes back to the job site other than our employees as we will be responsible for any actions they take and when I talked to, uh, they were together—they were operating together, Mr. Oglesby and Mr. Mosley.

I'm not sure which one I talked to on the phone, but I believe it's Mr. Oglesby and I got a cussing that time and it kept on and on and he finally told me just to get myself a lawyer.
Q Did he say why you should get a lawyer?
A Yes Sir; he, uh, claimed that Higdon Construction Company was doing the job up there and I informed him that they were not, that Higdon Construction Company did not have a contract with W. R. Grace Company and he said we were in violation of contract and that we should get a lawyer because we [76] would have to go to court with 'em.
Q Now, state whether or not you ever saw a picket by Local 103 Iron Workers at the W. R. Grace job.
A Yes Sir; I did.

Q When did you first see it?
A It was on or about the twenty-ninth of January.
Q Of what year, please?
A 1974.
Q And did you see it there after that first day?
A Yes Sir; it was there, uh, quite consecutively. I don't know exactly how many days; it ran on up into March 1st was the last day the picket sign was there.
Q Showing you Petitioner's exhibit number two, I ask you to state whether that is or is not the ledgend; whether this correctly depicts the ledgend on the picket sign that you saw during that period of the W. R. Grace project?
A Yes Sir; it does. In fact, I took this picture myself.
Q And were there any days during [77] period, January 29th through March 1, 1974, when there was no picketing?
A Yes Sir; there was.
Q About how many times, please?
A Uh, I would say just purely by memory, four to five days at the most that they weren't there; it was days that it rained or something happened.
Q Now, state whether or not Higdon Contracting Company Incorporated was at any time in 1974 engaged at a project at Barmet in Rockport, Indiana?
A Yes Sir; we started the Barmet project in Rockport approximately the twentieth of February of this year.
Q And state whether or not you have ever had any conversation with any official of Local 103 Iron Workers with regard to that job.
A Yes Sir; Mr. Charles Hill came over, it was one of the first couple of days we were there. I'm not sure of the exact date; around the twentieth or twenty-first, somewhere in there, and asked me at that time if we were going to use Union people on the job and I informed him that Higdon [78] Contracting Company was doing the job; we did not have a contract with 'em and that we were not going to do the job Union.

Q Did he make any response to that?
A Yes Sir; he did. He said, "I'll get right on it", and he got into his car and left.
Q Did you or did you not thereafter see any picket signs by the Union at the Barmet job?
A Yes Sir; there were pickets by several Unions and the Iron Workers Local 103 was one of those.
Q And when did you see such a picket by Local 103?
A Uh, on March 5th was one day.
Q 1974?
A Yes Sir.
MR. LANKER: Would you mark this as Petitioner's exhibit three?

(Whereupon a photograph was marked for identification as Petitioner's Exhibit [78b] Number Three.)

MR. LANKER: We offer Petitioner's exhibit number three; I have nothing further on direct, Your Honor.
BY THE COURT: All right.
MR. BERGER: No objection.

(Whereupon Petitioner's Exhibit Number Three was received in evidence.)

• • • •

[97] BY THE COURT: Well, let me say this, Gentlemen; I realize, of course, that in these matters of labor injunction the Court is not held to the cold, high standard of granting of regular equitable relief; that is, such standards as irreparable harm, and such standards as reasonable probability of eventual success, and I am not under any burden in a case of this type to go to the merits and decide whether or not certain things do, in fact, exist.

I just look at the thing as a whole, and decide whether I think injunction relief is just or proper.

Now, I think from a cold, technical, legal situation, uh, particularly when I take into [98] account the fact he could have sought the certification uh, this is an VIII(b)(7)(c) case, but I am right disturbed, very frankly, by the fact that the Government wants to use the injunctive power of this Court when there is no strike; no

picketing; and, uh, when there was a little picketing out there with a sign or two there was no violence and no call on me to come down with a heavy hand of the United States when I am confronted with a test as to whether or not something is just and proper.

In view of this corporate gymnastics that has been pulled here, uh, this Court is just not that loose with its equitable power. The matter is going to be heard on the twenty-ninth of May.

It will be a matter of those possessed with the expertese in labor matters to make a quick determination of this situation.

If there is picketing between now and the twenty-ninth I will hear the Government, but I am not prone to issue any order that brings down the power of the United States with a matter in the situation it is in today.

I deny the injunction.

• • • •

PETITIONER'S EXHIBIT #2

PETITIONER'S EXHIBIT #3

RESPONDENT'S EXHIBIT A

REGION 25
ISTA Center, 150 West Market Street
Indianapolis, Indiana 46204

Telephone (317) 633-8921

Mr. Ray Blankenship
Blankenship & Williams
P. O. Box 27194
Indianapolis, Indiana 46227

Re: BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS LOCAL #103
Case No. 25-CC-299

Mr. Blankenship:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that further proceedings on the charge are warranted inasmuch as there is insufficient evidence of violation (see attached summary report). I am, therefore, refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D. C. 20570 and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D. C., by the close of business on _____. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington, and a copy of any such request should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

/s/ George M. Dick
GEORGE M. DICK
Acting Regional Director

Enclosures—Notice of Appeal
REGISTERED MAIL
RETURN RECEIPT REQUESTED
Attachment

cc: General Counsel, c/o Office of Appeals, National Labor Relations Board, Washington, D. C. 20570

Higdon Contracting Co., Inc., 616 Breckenridge Street, Owensboro, Kentucky

Bridge, Structural & Ornamental Iron Workers, Local #103, 5313 Old Boonesville Highway, Evansville, Indiana

SUMMARY REPORT

The charge was filed April 2, 1974. The Charging Party was requested but has failed to proffer a scintilla of substantive evidence in support of this 8(b)(4) charge and takes the position that the evidence in the file in 25-CP-63-1-2 supports the instant charge. This file reflects that the only purpose of the picketing was to require the Employer to honor its contract with Bridge, Structural & Ornamental Iron Workers, Local 103. *Highway Truckdrivers & Helpers, Local 107, Etc.*, 134 NLRB 1320. Inasmuch as the Charging Party has refused to specifically articulate his theories and refused to identify what Company officials would testify to, any additional evidence that would be relevant to the charge, or what relevant evidence was available, it was decided that no further investigation was warranted. Since there is no evidence to support the charge, it is hereby dismissed.

Form NLRB
(1-68)

Form Approved
Budget Bureau No. 64-R0010

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 25-CC-299

Date Filed 04-02-74

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name
Bridge, Structural & Ornamental Iron Workers Local #163

b. Union Representative to Contact

c. Phone No.

d. Address (Street, city, State and ZIP code)
5313 Old Boonesville Highway, Evansville, Ind.

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) ——— (List subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Picketing various construction sites of Higdon Contracting Co., Inc. to compell Higdon Contracting Co., Inc. to recognize or bargain with the above labor union which has not been certified.

The above union has induced and encouraged individuals employed by other companies, a neutral employer for an object of compelling such neutrals to cease doing business with Higdon Contracting Co., Inc.

'74 APR 2 PM 1:53

3. Name of Employer
Higdon Contracting Co., Inc.

4. Location of Plant Involved (Street, city, State and ZIP code)
516 Breckenridge St., Owensboro, Ky.

5. Type of Establishment (Factory, mine, wholesaler, etc.)
Construction

6. Identify Principal Product or Service

7. No. of Workers Employed

8. Full Name of Party Filing Charge
Blankenship & Williams, for Higdon Contracting Co., Inc.

9. Address of Party Filing Charge (Street, city, State and ZIP code)
P.O. Box 4713, Indianapolis, Ind. 46227

10. Telephone No.
317-734-7031

11. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Blankenship & Williams
(Signature of representative or person making charge)

(Title or office, if any)

for Higdon Contracting Co., Inc.

Address P.O. Box 4713, Indianapolis, Ind. 46227 (Telephone number) (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001).

44

RESPONDENT'S EXHIBIT B-1

ACCEPTANCE OF AGREEMENT

The undersigned contractor having read and been supplied with the Agreement between the Tri-State Iron Workers Employers Association, Inc. and the International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 103, hereby accepts and approves said Agreement and becomes one of the Parties thereto.

Said Agreement being in effect from April 1, 1973, covering the jurisdictional area which extends half-way to the nearest outside Local Union of Bridge, Structural and Ornamental Iron Workers.

HIGDON CONST. CO., INC.
Company

/s/ Gerald J. Higdon
By

616 Breckenridge St.
Address

DATE 7-31-73

WITNESS /s/ Bill Moseley

_____
_____
Telephone Number

_____
Name of Insurance Company

_____
Address

_____
_____

Area mailing address if different from Company office:
_____

RESPONDENT'S EXHIBIT C-1

[Received 8:26 A.M., June 20, 1974, NLRB Region 25, Indianapolis, Indiana]

Commencing with the ——— day of ——— 19 ———, the undersigned Employer agrees to make contributions to the Iron Workers St. Louis District Council Pension Trust and/or Welfare Plan in the amount and in conformance with the respective controlling collective bargaining Agreement of said Iron Workers Local Union within whose jurisdiction the work is performed. The Employer agrees to pay the effective rate of contribution(s) for each hour for which the Employee is paid, for all Employees who are members of an Iron Workers Local Union affiliated with the International Association of Bridge, Structural and Ornamental Iron Workers, and such other Employees who are not members of any Local Union of the International Association of Bridge, Structural and Ornamental Iron Workers, who perform similar work, to the IRON WORKERS ST. LOUIS DISTRICT COUNCIL WELFARE PLAN AND/OR, IRON WORKERS ST. LOUIS DISTRICT COUNCIL PENSION TRUST.

The undersigned hereby agrees to become a party and be bound by all the terms and provisions of:

(a) The Agreement and Declaration of Trust, dated July 17, 1953 and all Amendments thereto, of the IRON WORKERS ST. LOUIS DISTRICT COUNCIL WELFARE PLAN, and/or

(b) The Agreement and Declaration of Trust, dated July 30, 1963 and all Amendments thereto, of the IRON WORKERS ST. LOUIS DISTRICT COUNCIL PENSION TRUST.

with the same force and effect as though the undersigned originally signed the said Agreements and Declarations of Trust, and hereby authorize the Employer Trustees

named in those Agreements to act for and on behalf of the undersigned.

Dated:

Higdon Const. Co. Inc.
(Name of Company)

By /s/ Gerald J. Higdon
(Signature of Individual)

_____
Street or P.O. Address

_____
City State

Iron Worker's Local Union No. 103

By /s/ William G. Oglesby
(Authorized Representative)

LOCAL UNION COPY

RESPONDENT'S EXHIBIT D

AGREEMENT

THIS AGREEMENT made this First day of April, 1973, by and between the Tri-State Iron Workers Employers Association, on behalf of its members who employ workmen under the terms and conditions contained herein, and have signed a Letter of Assent to be bound by this Agreement for its duration as set forth below, and Local Union 103, International Association of Bridge, Structural and Ornamental Ironworkers. It shall also apply to other individual employers who employ workmen under the terms of this Agreement and by virtue of signing a similar Letter of Assent, authorize the Tri-State Iron Workers Employers Association, as their collective bargaining agent for all matters contained herein or affecting this Agreement, including all amendments or revisions adopted pursuant thereto. The term "Employer" as used hereinafter shall mean the Tri-State Iron Workers Employers Association. The term "Union" as used hereinafter shall mean Local Union No. 103, IABSOIW.

PREAMBLE: This Agreement is entered into by collective bargaining to prevent strikes and lockouts and to facilitate peaceful adjustment of grievances and disputes between Employer and Union in this trade and to prevent waste, unnecessary and avoidable delays and expense; and so far as possible, to provide for labor's continuous employment, such employment to be in accordance with the conditions herein set forth and at wages herein agreed upon; also, that stable conditions may prevail in the building industry and building costs may be as low as possible, consistent with fair wages and conditions and further, the establishment of the necessary procedures by which these ends may be accomplished.

WITNESSETH THAT: The Employer and Union, in consideration of their mutual promises, agree as follows:

ARTICLE I

Definition of Employee

Whenever the term "Employee" is used herein, the same shall be deemed to mean and refer to a person employed by the Employer and having a job classification of or performing labor as a practical Journeyman Iron Worker or Apprentice.

ARTICLE II

Employer's Liability

It is understood and agreed that the Negotiating Agent, Tri-State Iron Workers Employers Association shall in no event be bound as a principal or Employer hereunder or be held liable as a principal or Employer in any manner for breach of this Agreement by any party hereto: That the liability of the Employers who accept, adopt and sign this Agreement, or a facsimile thereof, hereunder is several and not joint.

This Agreement covers the entire understanding between the parties hereto. No oral or written rule, regulation, or understanding—which is not embodied herein—shall be of any force or effect upon the parties hereto, and it is the intention of the parties hereto to fully preserve the full force and effect of all provisions of the Agreement not contrary to law.

ARTICLE III

Area Limits

The territory covered by this Agreement shall be the territorial jurisdiction of Local Union No. 103, which extends half-way to the nearest outside Local Union of the International Association of Bridge, Structural and Ornamental Iron Workers.

ARTICLE IV

Declaration of Principles

The following underlying principles shall apply to all regulations under this Agreement:

(a) No limitations shall be imposed upon the amount of work an Employee shall perform during his working day.

(b) No restrictions shall be imposed upon the use of machinery, tools, or appliances, except as may be hereinafter provided in the Working Rules.

(c) No restrictions shall be imposed upon the use of any raw or manufactured materials, except that prison-made materials or products shall not be used, unless mutually agreed by parties to this Agreement.

(d) Employees shall be entitled to demand and receive the wages and all other benefits provided for by the terms of the Agreement.

(e) The use of Apprentices shall be recognized and not prohibited.

(f) The Foreman, General Foreman and Area Foreman shall be selected by and recognized as the agent of the Employer.

(g) It is the intent and purpose of this Agreement to prevent slowdowns, forcing of overtime, spread-work tactics, standby crews, and featherbedding practices.

ARTICLE V

Working Rules

1. WORK DAY: Eight (8) hours shall constitute a day's work from 8:00 a.m. to 4:30 p.m. from Monday through Friday, inclusive, except in territories where a shorter work day prevails among a majority of the Building Trades Unions on building work. Noon hour may be curtailed by agreement with the men on the job and the Employer or his Representative. Each Employee covered by this Agreement shall be entitled to a thirty (30) minute lunch period between 12:00 noon and 1:00 p.m.; and

if said lunch period is not provided, the Employee shall receive pay for a thirty (30) minute lunch period in accordance with the overtime provision.

When Employees are required to work more than two (2) hours after the regular quitting time, they shall be allowed one-half (½) hour for supper time at the overtime rate and they shall be allowed one-half (½) hour for lunch at the overtime rate for every four (4) hours worked thereafter.

Starting time may be changed if agreed to between the contractor and the Business Agent or his representative with lunch period being altered proportionately.

2. SHIFT WORK: When two (2) shifts are employed, each shift shall work seven and one-half (7½) hours for eight (8) hours pay at regular time; when three (3) shifts are employed, seven (7) hours shall constitute a day's work for each shift for which a regular wage of eight (8) hours shall be paid, or a proportionate part thereof, for time worked. When multiple shifts are worked on Saturday, Sunday or recognized holidays, the following shall apply: When two (2) shifts are employed, each shift shall work seven and one-half (7½) hours for eight (8) hours pay at double the straight time rate of wages. When three (3) shifts are employed, each shift shall work seven (7) hours for eight (8) hours pay at double the straight time rate of wages, or a proportionate part thereof for time worked. On all shift work performed on Saturday, Sunday or holidays, the overtime rate of double time shall start with the beginning of the first, or "morning" shift. Not more than one (1) shift shall be allowed on a job of less than five (5) days duration except in case of an emergency, which shall be decided by the General Executive Board. No one Employee shall work multiple shifts except in cases of emergency.

3. OVERTIME AND HOLIDAYS: Double time shall be paid for any and all work in excess of eight (8) hours on any regular work day and for all time worked on Saturday, Sunday and recognized holidays. No work shall be performed on Labor Day, except to save life or property. The following holidays shall be observed: New

Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, the day following Thanksgiving Day and Christmas Day. Any holiday which occurs on a Sunday shall be observed the following Monday.

4. WAGE RATES: Effective April 1, 1973, the following minimum hourly wage rates shall apply as indicated payable in wages or fringes at the Union option:

	Effective 4-1-73	Effective 4-1-74	Effective 4-1-75
Journeyman	$8.80	$ 9.30	$ 9.85
Foreman	9.30	9.80	10.35
General Foreman	9.55	10.05	10.60
Area Foreman	9.80	10.30	10.85

In addition to the above four rates, a cost of living increase may be paid for the years 1974 and 1975.

If the cost of living as published by the Consumer Price Index increases for the year 1973 above a base rate of 4.0%, then the difference in this increase will be multiplied times $9.30 and added to the wage rate beginning April 1, 1974, and the 1973 Consumer Price Index will become the base rate.

If the 1973 Consumer Price Index is less than 4.0%, then 4.0% remains the base there will be no additional increase.

If the cost of living as published by the Consumer Price Index increases for the year 1974 above the base rate, then the difference will be multiplied times $9.30 and added to the wage rate beginning April 1, 1975.

If the 1974 Consumer Price Index is less than the base rate, there will be no additional increase.

5. WELFARE PLAN: All Employers signatory hereto agree to pay forty (40) cents per hour for each hour for which the Employee has worked for all Employees covered by this Agreement to the Iron Workers St. Louis District Council Health and Welfare Plan, 4401 Hampton Avenue, St. Louis, Missouri. The contributions of the Employers shall be used exclusively to provide Group Life Insurance, Accidental Death and Dismemberment Insurance, Hospital Expense Insurance, Surgical Expense

Insurance, Medical Expense Insurance and Temporary Disability Benefits to eligible Employees and their dependents; and to provide funds for organization and administration expenses of said Fund all in accordance with the Agreement and Declaration of Trust as established by the duly elected Employer and Employee representative Trustees.

The said Welfare Fund shall be administered pursuant to an Agreement and Declaration of Trust administered jointly by an equal number of representatives of the Employers and the Union, which Agreement and Declaration of Trust shall conform to all requirements of Law. A copy of said Agreement and Declaration of Trust, together with any amendments thereto, shall be considered as part of this Agreement as though set forth here at length.

Welfare contributions shall be paid monthly up to and including the last payroll date in each and every calendar month on or before the fifteenth (15th) day of the following month and shall be recorded on forms supplied by the Welfare Fund.

6. PENSION FUND: The Employers covered under this Agreement agree to pay fifty (50) cents per hour for each hour for which the Employee is paid for all Employees covered by this Agreement to a Pension Fund. The contribution of the Employer shall be used exclusively to provide old age or disability pensions to Iron Workers in such form and amounts as the Trustees of the Pension Fund may determine, and the organization and administration expenses of the Pension Fund.

The said Pension Fund shall be administered pursuant to an Agreement and Declaration of Trust administered jointly by an equal number of representatives of the Employers and the Union, which Agreement and Declaration of Trust shall conform to all requirements of law. A copy of the said Agreement and Declaration of Trust, together with any amendments thereto shall be considered as part of this Agreement as though set forth here at length.

Pension contributions shall be paid monthly up to and including the last payroll date in each and every calendar month on or before the fifteenth (15th) day of the following month and shall be recorded on forms supplied by the Pension Fund.

7. APPRENTICES: According to the following percentage of Journeyman scale:

1st 6 months	70%
2nd 6 months	75%
3rd 6 months	80%
4th 6 months	85%
5th 6 months	90%
6th 6 months	95%

Two and one-half (2½) cents per hour will be contributed to a jointly administered apprenticeship and training program.

Apprentices shall be used in accordance with the provisions set forth in the Constitution and Apprenticeship Standards.

8. PAY DAY: The regular pay day shall be once a week on such day as agreed upon between the Employer and the Local Union, and wages shall be paid before quitting time, and wages are to be paid in cash or other legal tender.

Employers may withhold three (3) days of wages due, to enable them to prepare the payroll, or as mutually agreed.

When Ironworkers are laid off, or discharged, they shall be paid in full in cash or other legal tender on the job immediately, and if required to go to some other point or to the office of the Employer, each Ironworker shall be paid for the time required to go to such place. When Ironworkers quit of their own accord, they shall wait until the regular pay day for the wages due them.

Any undue delay or loss of time caused Ironworkers through no fault of their own, shall be paid for by the Employer causing such delay at the regular straight time wages.

Accompanying each payment of wages shall be a separate statement identifying the Employer, showing the total earnings, the amount of each deduction, the purpose thereof, and net earnings.

9. REPORTING TIME: When an Employee is ordered by the Employer or his representative to report for work and then through no fault of the Employee, he is not put to work, or is employed for less than two (2) hours, the Employer shall pay him for two (2) hours time, except when Employees are notified the day previous and not later than ten (10) minutes before quitting time, that their services are not needed the following day. On jobs of more than two (2) hours' duration, all Employees shall be paid for actual hours worked.

10. TRANSPORTATION: Adequate transportation shall be provided, when the work is performed more than one-fourth (¼) mile from parking facilities.

11. FOREMAN — GENERAL FOREMAN — AREA FOREMAN — CREW SIZE: When two (2) or more Ironworkers are employed, one (1) shall act as Foreman. When two (2) gangs are employed, one (1) Foreman shall be classified as a General Foreman who will have supervision over the other Foreman and will supervise one (1) gang. When three (3)gangs are employed, there will be a full time General Foreman who will supervise the Foremen of the three (3) gangs. When the fourth gang is employed, an Area Foreman shall be employed who will supervise the General Foreman and Foreman of the fourth gang. When the fifth gang is employed, an additional General Foreman shall be employed who will supervise the fourth, fifth and sixth gangs, and also be under the supervision of the Area Foreman. This same ratio shall be maintained for General Foreman as the number of gangs increase, however, there shall be no limit on the number of General Foremen under an Area Foreman.

No more than seven (7) Journeyman Ironworkers shall be under the supervision of one (1) Ironworker Foreman. When erecting structural steel with power equip-

ment the Ironworker Foreman shall supervise this gang only.

12. IRON WORKERS REQUIRED ON GUY AND STIFF LEG DERRICKS: No less than six (6) men and a foreman shall be employed around any Guy or Stiff Leg Derrick used on steel erection, and on all power-operated rigs of any description, no less than four (4) men and a foreman shall be employed except on special occasions. The crew size may be reduced where it is feasible and agreed upon between the Business Agent and the Contractor performing such work. However, at no time shall an Agreement on one job be construed as to mean the same condition shall exist on other jobs of like manner, due to the varied safety conditions of the workmen performing the work in different locations and under different hazards of the trade.

13. REINFORCING: On all concrete reinforcing work in the Ironworkers jurisdiction, Ironworkers shall be used to load and unload (except by hand), place, fasten or insert for all pours. If, at the time the concrete pour is being made and the services of an Ironworker is not required, it will be unnecessary for the Contractor to employ an Ironworker to watch or stand by the pour. No less than one (1) Ironworker shall be used to straighten, move reinforcing or pulling mesh. Adding reinforcing steel which may have been left out, shall be done by an Ironworker. On all shift work and before and after regular working hours, an Ironworker shall be available when concrete pours are made. If iron work is required on a concrete pour, a call shall be made to the Business Agent regarding this matter.

14. REELS: Employers shall furnish reels and tie wire on all reinforcing jobs requiring same. Reel shall remain property of the Employer.

15. RIVETING GANGS: Riveting gangs shall be composed of not less than four (4) men at all times. The Employer may require heaters to have their fires going ready to furnish hot rivets at the regular starting time,

but in such event, the heaters shall be paid double time for such time worked before the regular starting time.

When three (3) or more riveting gangs are employed on any job, a Foreman shall be employed who shall not be required to work in any riveting gang except where emergencies arise which will require the Foreman to temporarily fill in the gang.

16. SAFETY PROVISIONS: All provisions of safety, as set out by the Occupational Safety and Health Act, shall be observed with special attention to safety practice governing Planking floors, Riding Loads, Slings, Signaling and Elevator Shaft Protection.

An Ironworker Welder or Burner shall have the right to refuse (for reasons of safety) to work off the ground without a Journeyman Ironworker Helper.

When structural steel is erected on water spans over rivers or streams with a water width of one hundred (100) or more feet and depth of more than five (5) feet, the Employer shall employ a Journeyman Ironworker, who is a qualified swimmer, as a safety man and furnish a boat to enable the safety man to patrol the water area beneath the bridge during all working hours when structural Ironworkers are working. The cost to qualify the swimmer will be borne by the Contractor.

17. NELSON STUDS: It is encouraged that all Nelson studs are to be field fabricated if attached to a top flange. The Contractor and Business Agent will resolve the safety problems in connection with other protruding objects.

18. TOOLS: Journeymen Ironworkers employed on ornamental, structural or rod work shall furnish their own tools. The following shall be construed as minimum requirements:

Ornamental

1—12" Hack Saw
1—Plumb Bob & Line
1—Scriber
1—Divider

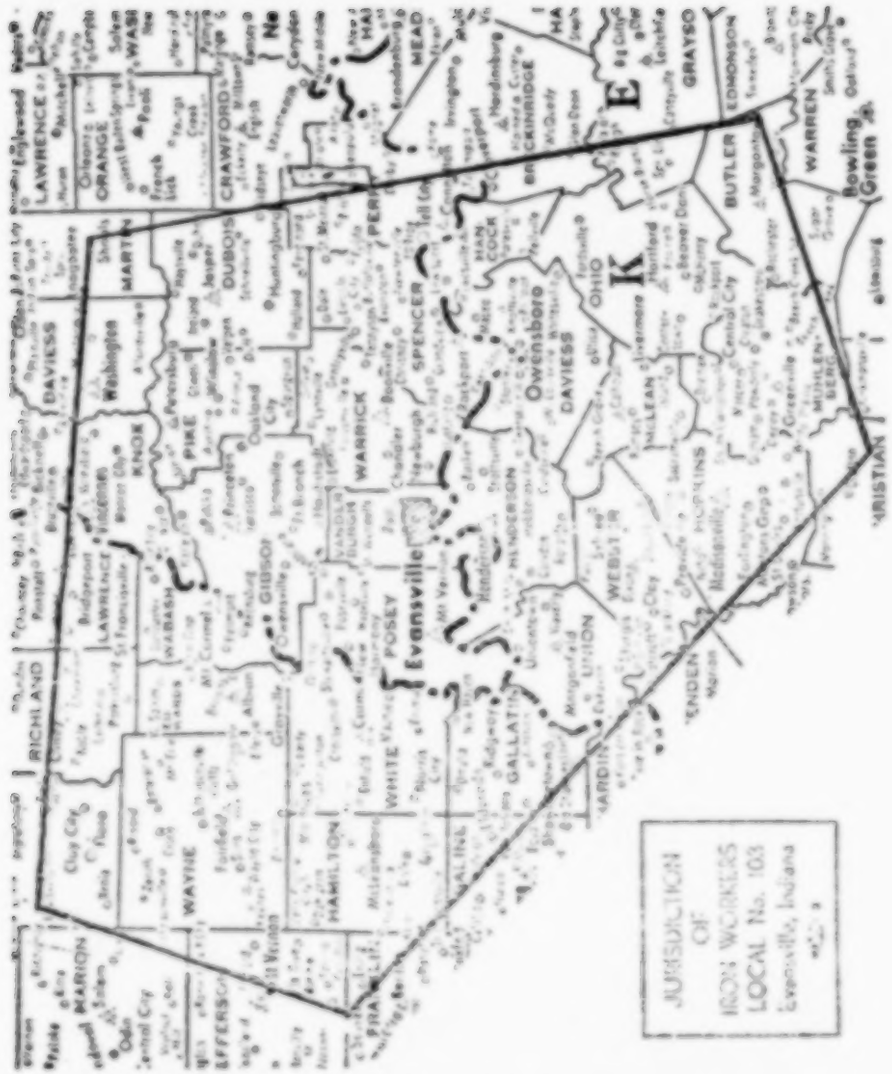
1—Rachet & Socket Wrench Set
2—C-Clamps
1—Center Punch
1—Drift Pin
1—Tap Wrench
1—6" Screw Driver
1—8" Screw Driver
1—12" Screw Driver
1—Offset Screw Driver
1—12" Square
1—50' Tape
1—6' Rule
2—Ball Peen Hammers
1—10" Pliers
1—8" Crescent Wrench
1—10" Crescent Wrench
1—12" Crescent Wrench
1—24" Level
1—Chalk Line Box
1—Set Open End Wrenches
4—Chisels

Structural

1—Belt & Bag
1—Bull Pin
1—6' Rule
1—Ball Peen No. 2 Hammer
1—50' Tape per gang, supplied by the Ironworker Foreman. All other special tools shall be supplied by the Employer.
1—¾" Spud Wrench
1—⅞" Spud Wrench
1—12" Crescent Wrench

Rodman

1—Pair Pliers
1—6' Folding Rule



19. WELDERS: All cost of certifying welders shall be paid by the Employer. A copy of certification must be forwarded to the Local Union office within thirty (30) days after date of test. An Employee shall be required to remain on that job at least fifteen (15) calendar days or until completion of that job, unless discharged. An Employee failing to comply with the above will have the wages that were paid for his taking such test, deducted from his final pay.

When welding is done on any work covered in this Agreement, it shall be done by Ironworkers. When welding on steel skeletons or when scaffolding is used, Journeyman Welders shall be provided with Journeyman Assistants as follows: When two (2) or three (3) Journeyman Welders are used, one (1) Journeyman Assistant shall be employed. When four (4) or five (5) Journeymen Welders are used, two (2) Journeymen Assistants shall be employed. If more welders are employed the same ratio of Journeyman Assistants shall be used.

On all welding jobs requiring protective clothing, such as gloves, sleeves, hood and jackets, they shall be furnished by the Employer.

20. POWER EQUIPMENT: Iron Workers will perform all work pertaining to erecting guy or stiff leg derricks, skip hoist, tower cranes, tramways, cable ways, gin pole, Chicago Boom, A frames, gallows frames, jib crane, overhead cranes, or any other lifting equipment used in performing work claimed by Ironworkers.

21. RIGGING: When machinery or equipment under the jurisdiction of Iron Workers is moved which requires jacks, rollers, chain falls, sling chokers or any type of power equipment, the Employer shall employ Iron Worker riggers to perform such work.

22. WINDOWS: When steel, aluminum, bronze or any metal windows are installed in prepared openings, or attached to structural steel, they shall be erected by Ironworkers.

23. HAND RAILS: When welded pipe hand rails are erected, Iron Workers shall be employed to perform all welding and necessary work to complete the job. Iron Workers shall be required to furnish all necessary hand tools.

Any work installed by the Ironworkers that requires the use of the instrument level or transit, shall be performed by an Ironworker or a professional engineer.

24. TOOL CRIB OR ROOM: When tools and/or supplies are checked out or in, for the Iron Workers Trade,

a Journeyman Ironworker shall be the Tool Room Attendant. The necessity for a Tool Room shall be determined by the Employer.

25. PRECAST: Iron Workers shall perform all reinforcing work pertaining to (prestressing) and precast concrete girders, columns, joist, footing, beams and slabs, including the handling and setting of same. Also, all necessary handling and setting of all tilt up slabs and all precast concrete panels when attached to steel or handled by power equipment. All reinforcing work pertaining to lift slabs, including wrapping, greasing and operation of prestressed jacks and lift jacks. Number of men to be in each crew shall be determined by the Contractor and the Business Agent.

26. SHIPPING—EMPLOYEES: Employees shipped to jobs or work out of the jurisdiction of the Local Union shall receive transportation, traveling time and expenses, providing they remain on the job thirty (30) days. Employees shipped to a job and not put to work, weather permitting, or the job is not ready for them to go to work, shall be paid the regular wage rate for such time, or such employee shall be shipped back to the shipping point with time and transportation paid by the Employer.

27. DRINKING WATER—CLOTHES ROOM: The Employer shall furnish suitable drinking water at all times and each job of sufficient size and length to justify same, shall be provided with a suitable shed or room for the Employees to change their clothes and keep their tools.

28. COMPENSATION INSURANCE: The Employer must, at all times, provide Workmen's Compensation Insurance and Unemployment Insurance, according to the laws governing the several states covered by the geographical jurisdiction of the Union.

29. BUSINESS REPRESENTATIVE: The Business Representative of the Union shall be permitted to visit all jobs, but will in no way interfere with the progress of the work.

30. JOB STEWARD: There shall be a Steward on each job who shall be appointed by the Business Representative or elected by the men on the job. He shall keep a record of the workers laid off and discharged and take up all grievances on the job and try to have the same adjusted and in the event he cannot adjust them, he must promptly report that fact to the Business Representative, who shall report same to the proper office of the Union so that efforts can be made to adjust any matter without a stoppage of work. He shall see that the provisions of this Agreement are complied with and report to the Union the true conditions and facts. The Steward shall promptly take care of injured Ironworkers and accompany them to their homes or to a hospital, as the case may require, without any loss of time and report the injury to the proper officers of the Union. The Employer agrees that the job Steward will be the last man laid off, providing he is capable of performing the work in question. The job Steward shall be notified by the craft Supervisor in time to discuss any changes, if necessary, with the Employer before any Ironworkers are discharged or laid off.

31. PROTECTION OF UNION PRINCIPLES: The removal of Journeymen Iron Workers and Apprentices from a job in order to render legal assistance to other Local Unions to protect Union Principles shall not constitute a violation of this Agreement, provided such removal is first approved by the General Executive Board and notice thereof is first given to the Employer involved.

32. SUB-CONTRACTORS: Where not contrary to the laws of several states covered by area limits, the Employer agrees not to sub-contract or sub-let any work covered by this Agreement to any person, firm or corporation which is not in contractual relationship with the international Association of Bridge, Structural and Ornamental Iron Workers or any of its affiliate Local Unions.

33. SAVINGS CLAUSE: Should any part of or any provisions herein contained be rendered or declared invalid by reason of any existing or subsequently enacted Legislation, or by any decree of a Court of competent jurisdiction, such invalidation of such part or portion of this Agreement shall not invalidate the remaining portions thereof; provided, however, upon such invalidation the parties signatory hereto agree to immediately meet to renegotiate such parts or provisions affected. The remaining parts or provisions shall remain in full force and effect.

34. LETTERS: Upon request by the Union, Employers who employ Iron Workers in the jurisdiction of Local 103, shall furnish the Union with signed letters on their letterhead, stating they have paid the negotiated wage scale. The text of the letter shall consist of scale of wages, type of work performed, total number of Iron Workers employed on project or any other information requested to be used to establish jurisdictional claims or prevailing wage rates.

ARTICLE VI

Grievance Procedure

If any controversy, dispute or grievance arises with respect to the interpretation, application, or enforcement of any of the provisions of this Agreement, the same (herein referred to as the "issue"), shall be first submitted to the Business Representative of the Union and to an Executive Officer of the Employer for settlement: If the issue is not thus disposed of within twenty-four (24) hours after such submission, the same shall then be immediately referred, in writing, to a Labor Management Committee (hereinafter provided for) for consideration and settlement. The Labor Management Committee shall prescribe all rules of procedure and shall furnish all parties to the issue a reasonable opportunity to be heard thereon.

Any decision rendered by a majority of the members of the Labor Management Committee shall be final and binding on all parties. During the above procedure, there shall be no stoppage of work.

The Labor Management Committee above referred to shall be composed of equal representation by the Employer and Employee and shall consist of not less than three (3) Employer-Representatives and not less than three (3) Employee-Representatives.

In the event an impasse is reached, the Labor Management Committee will mutually agree within twenty-four (24) hours on a neutral party to decide the issue.

ARTICLE VII

Strikes and Lockouts

It is mutually agreed that there shall be no strikes authorized by the Union or no lockouts authorized by the Employer, except for the refusal of either party to submit to arbitration, in accordance with Grievance Procedure, or failure on the part of either party to carry out the award of the Board of Arbitration.

Every facility of each of the parties hereto is hereby pledged to immediately overcome any such situation; provided, however, it shall not be a violation of any provision of this Agreement for any person covered by this Agreement to refuse to cross or work behind the picket line of any affiliated Union which has been authorized by the International of the Union.

ARTICLE VIII

Craft Jurisdiction

It is agreed that the jurisdiction of work covered by this Agreement is that provided for in the Charter Grant issued by the American Federation of Labor to the International Association of Bridge, Structural and Ornamental Iron Workers, it being understood that the claims are subject to Trade Agreements and final decisions rendered by the National Joint Board for Settlement of Jurisdictional Disputes.

The parties to this Agreement are subject to and agree to be bound by all decisions and awards made by the National Joint Board for Settlement of Jurisdictional Disputes with respect to all jurisdictional disputes which maye arise under this Agreement.

ARTICLE IX

Termination

The Agreement with any amendments thereof made as provided for therein, shall remain in full force and effect until midnight of March 31, 1976, and, unless written notice be given by either party to the other at least three (3) months prior to such date of a desire to change therein or to terminate the same, it shall continue in effect for an additional year thereafter. In the same manner, this Agreement, with any amendments thereof, shall remain in effect from year to year thereafter, subject to termination at the expiration of any such contract year upon notice, in writing, given by either party to the other at least three (3) months prior to the expiration of such contract year. Any such notice as hereinabove provided for in this Article, whether specifying a desire to terminate or to change at the end of the current year, shall have the effect of terminating this Agreement at such time.

IN WITNESS WHEREOF: This Agreement has been executed by the parties hereto as of the date and year first written, in the City of Evansville, State of Indiana.

FOR THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL UNION NO. 103

Charles W. Hill
Business Agent
Joel W. Morefield
President
James R. Oglesby
Recording Secretary
Otto D. Hill
Edgar Barnett
Louis H. Dersch
Gordon R. Hill
Ronald K. Gower

FOR THE TRI-STATE IRON WORKERS EMPLOYERS ASSOCIATION

Poe Steel Erection, Inc.
David C. Poe, President
Allied Erection & Conveyor, Inc.
Joseph J. Vezzoso, President
Tri-State Steel Erection Inc.
John Robert Moye, President
Industrial Contractors Inc.
Alan W. Braun, Vice-President

Dated: April 11, 1973

AMENDMENT TO AGREEMENT

WHEREAS, on the First day of April, 1973, an Agreement was made by and between the Tri-State Iron Workers Employers Association, hereinafter called "the Association", on behalf of its members who employ workmen under the terms and conditions contained therein, and have signed a Letter of Assent to be bound by said Agreement for its duration as set forth therein, and of other individual employers who employ workmen under the terms of said Agreement and by virtue of signing a similar Letter of Assent, authorize the Association to act as their collective bargaining agent for all matters contained therein or affecting said Agreement, including all amendments or revisions adopted pursuant thereto, each of which member and other individual employers are hereinafter called "the Employer", and Local Union 103, International Association of Bridge, Structural and Ornamental Ironworkers, hereinafter called "the Union"; and

WHEREAS, Article V, Sec. 4 of said Agreement provides that the minimum hourly wage rates fixed therefore shall be payable in wages or fringes at the Union's option; and

WHEREAS, the Union now exercises its option to provide that Twenty-five Cents ($.25) of each hour's wage paid for straight time, and Fifty Cents ($.50) of each

hour's wage paid for overtime shall be payable in fringe benefit as Vacation Pay, which shall be paid as hereinafter set forth,

NOW THEREFORE IT IS AGREED by and between said Association, on behalf of all of said Employers and said Union, that:

1. Each Employer shall, beginning September 1, 1973 and continuously during the duration of said Agreement of April 1, 1973, withhold and deposit in the Warrick National Bank of Boonville in Boonville, Indiana, in a separate account for all Employees covered by said Agreement, the sum of Twenty-five Cents ($.25) per hour for each hour of straight time, and the sum of Fifty Cents ($.50) per hour of overtime, for each hour for which the Employee has received wages.

2. Said deposits shall be made monthly on or before the Fifteenth day of each month by each Employer in said Warrick National Bank of Boonville in individual accounts for each Employee.

3. Each Employer shall furnish to said Bank at the time of making said deposits a statement setting out the name of each Employee, the Social Security number of each Employee, number of hours straight time and number of hours overtime worked for the month covered for each Employee, and the amount to be deposited to said Employee's account in said Bank pursuant to this Vacation Plan.

4. Each Employer shall, at the same time, send two copies to Warrick National Bank of said statement, which is given to the Bank as hereinabove set out; said statement shall also contain the amount which the Employer has contributed to the "jointly administered apprenticeship and training program" as provided for in Article V, Sec. 7 of said Agreement of April 1, 1973.

5. Each Employer shall show on each check stub of each Employee the amount of money withheld as hereinabove set out for the Vacation Plan.

6. If the Business Manager of Local 103 believes it is necesasry, he may request that the monies not be deducted and be applied to the Employees check.

7. Upon request by the Business Manager, the Employer shall furnish to said Business Manager such information and reports as he may request.

DATED at Evansville, Indiana, this 15th day of August 1973.

LOCAL UNION No. 103

By Charles W. Hill

TRI-STATE IRON WORKERS
EMPLOYERS ASSOCIATION

By John Robert Moye

SUPREME COURT OF THE UNITED STATES

No. 76-719

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, ET AL.

ORDER ALLOWING CERTIORARI—
Filed February 22, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 232505 82

Supreme Court, U. S.
FILED
JAN 6 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL-CIO, et al.,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner's statement of the question presented is incorrect.

The question presented is, as stated in the opinion of the Court of Appeals:

"Whether an employer can abrogate unilaterally and breach a validly executed collective bargaining prehire agreement merely because the agreement was a prehire agreement in the construction industry validly entered into pursuant to Section 8(f) of the National Labor Relations Act." (Pet. App. 2a).

STATEMENT

Respondent, Local 103, briefly adds the following important facts of record to supplement petitioner's incomplete statement:

Respondent, Local 103, filed an unfair labor practice charge against Higdon, charging that it had violated Sections 8 (a) (1), (3), and (5) of the Act, but the Board summarily dismissed same, for the reason that "the only purpose of the picketing was to require the employer to honor its contract with Bridge, Structural and Ornamental Iron Workers, Local 103." (Pet. App. 9a, 17a; Tr. Ex. A to Ex. 1, p. 3).

Respondent Local 103 and the employer, Higdon, have had a collective bargaining relationship since 1968 (Pet. App. 15a). In 1973, after Higdon and respondent entered into the collective bargaining agreement involved in this case, Higdon decided to form a new company, Higdon Contracting Company, Inc., "in order to get around the contract." (Tr. 58).

The new company, Higdon Contracting Company, Inc., was formed solely to evade the contract with the union and was an alter ego for Higdon. The Administrative Law Judge and the Board so found in their decisions, and petitioner ruled that Higdon Contracting Company, Inc., was bound by the aforesaid collective bargaining contract with the union. (Pet. App. 20a, ft. 7).

In addition to issuing the unfair labor practice complaint against respondent Local 103, petitioner applied for an injunction against respondent to enjoin the picketing herein complained of. At the conclusion of the court hearing, the United States District Court denied petitioner's petition for an injunction, sharply criticizing the employer Higdon's conduct in this matter. Petitioner did not appeal the District Court's decision in favor of respondent Local 103. (Tr. 98).

REASONS FOR DENYING THE WRIT

The question presented is not a novel one, nor is there any conflict among the circuits in the settled law which petitioner herein seeks to set aside.

The decision below reaffirms a decision by the Court of Appeals which was handed down over three years ago. Although petitioner states that it was unhappy with that decision, this is weak ground indeed for granting certiorari. Further, petitioner did not appeal that decision nor did it even file a petition for rehearing. (Pet. App. 3a).

The Court of Appeals of the District of Columbia is not the only one to reject petitioner's policy in this area. In 1973, the U.S. Court of Appeals for the Third Circuit reversed petitioner and held that a construction industry employer that enters into an 8(f) contract is not free to repudiate the contract during its term, where the employees have refrained from seeking a representation election, as they have in the case at bar. *N.L.R.B. v. Irvin*, 475 F. 2d 1265 (C.A. 3, 1973).

Petitioner's entire case is based upon its erroneous statement of the issue in speaking of "recognitional picketing." The record is undisputed there was no recognitional picketing. The Administrative Law Judge, the Board itself, and the Court of Appeals also found and stated that the picket signs used by respondent stated the truth, when it said, "Higdon Construction Company is in violation of the agreement of the Iron Workers Local No. 103". Therefore, as the Court below stated, "The union here . . . had been picketing to secure compliance with an existing contract valid under Section 8(f), . . ." (Pet. App. 9a, ft. 4, 18a). However, petitioner insists on incorrectly calling the picketing "recognitional picketing." (Pet. App. 7a, 6a, and 9a; Br. 2, et passim).

Petitioner is in error when it states in its brief that the Court of Appeals assumed the correctness of the Board's conclusion that the picketing in this case was recognitional (Br. 11, ft. 6). Petitioner cites no language in the Court's opinion to support this erroneous conclusion. The Court of Appeals stated that the purpose of the picketing was "to secure compliance with an existing contract valid under Section 8(f)", not to compel employer recognition. (Pet. App. 9a, ft. 4).

The law is clear that, as the courts and the Board have all ruled, picketing by a union to secure compliance with an existing contract is not barred by Section 8(b) (7)(C). *Bay Counties District Council of Carpenters, etc.* (1965) 154 NLRB 1598, enf. 382 F. 2d 593 (C.A. 9, 1967). Yet the Board found the union's picketing in this case was in violation of Section 8(b) (7) (C) solely because of its erroneous ruling that Section 8(f) contracts may be unilaterally abrogated by an employer.

The Board adopted the position of the General Counsel who argued that since the contract in the case at bar was an 8(f) contract, "such contracts may with impunity thereafter, be ignored by the employer. . . ." (Tr. 6).

There is nothing in the language of the Act or its history to suggest that a valid contract can be breached by an employer because it is entered pursuant to the authority expressly conferred by Section 8(f) of the Act.

As the Court of Appeals for the Third Circuit held:

> "Nothing in neither the text nor the legislative history of Section 8(f) suggests that it was intended to leave construction industry employers free to repudiate contracts at will." *NLRB v. Irvin*, 475 F. 2d 1265, 1271 (C.A. 3, 1973).

This is exactly what was done by Higdon in the case at bar. The Court of Appeals for the District of Columbia ruled in accord with the Third Circuit:

> ". . . we can find no sanction in the language, history or policy of Section 8(f) for permitting an employer to abrogate unilaterally a validly executed prehire agreement or for permitting the employer to commit what is otherwise an unfair labor practice even though at the time of either the union has not achieved majority status." *Local No. 150, International Union of Operating Engineers, AFL-CIO v. N.L.R.B.*, 156 U.S. App. D.C. 294, 480 F. 2d 1186, 1190 (1973).

The facts in this case are a clear illustration of the pernicious effects of the Board's decision in *R. J. Smith*, 191 N.L.R.B. 693, which the Court of Appeals was alert to recognize and point out in its decisions in *Local No. 150, etc., supra*, and the case at bar.

> "Moreover, under the Board's interpretation, an employer, unhappy with a pre-hire agreement, can avoid it by discouraging union membership throught flagrant unfair labor practices, thereby insuring that the union never attains a majority." (480 F. 2d at 1190).

Thus, in this case the evidence is replete with unfair labor practices committed by the employer—even to the extent of setting up a dummy corporation "in order to get around the contract." The employer paid wages far below the prevailing wage rate agreed on in the contract and committed other unfair labor practices which were characterized by the learned District Court as "this corporate gymnastics which has been pulled here." (Tr. 58-59, 98).

Yet, when the union filed an unfair labor practice charge against the employer, Higdon, it was dismissed by the Board,

because the Board followed its decision in *R. J. Smith, supra.* (App. 9a, 17a). This not merely allows, but encourages an employer to engage in unfair labor practices.

This completely demolishes petitioner's contention that "the Act contains ample remedies to deter and check employer conduct designed to discourage union membership, including injunctive relief under Section 10(j) . . ." (Br. 19). Let alone injunctive relief, the Board would not even issue an unfair labor practice complaint in this case against the employer's unfair labor practices, which were pointed out by the Court of Appeals, as well as by the District Court.

Since petitioner's concern about employees being subject to contracts made by unions who do not have majority support is met by the proviso in Section 8(f) allowing employees and employers to petition for an election at any time, petitioner is forced to base its entire case on the weak complaint that under the decision of the Court of Appeals, the "burden" is placed upon the employer or employees to file a petition for an election. The Board wants this Court to hold otherwise. However the Act clearly so provides; petitioner would seek to have this Court rewrite the Act.

Further, there is no great "burden" placed upon an employer or employees by requiring them merely to file a petition for an election if any of them believe that the union does not have majority support. The record is barren of a single reason why this could not have been done in this case.

Petitioner's citation of *Linden Lumber Division v. National Labor Relations Board*, 419 U.S. 301, offers it no support. That case did not involve a Section 8(f) agreement. This Court did not in that case sanction an employer's flagrant violation of a contract it voluntarily entered into, after years of bargaining relationship, as was done in the case at bar, where the em-

ployer had the expeditious and reasonable alternative of petitioning for an election if it believed that the contract did not have the majority support of its employees.

Similarly, *Connell Construction Company, Inc. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, is not applicable to the case at bar and offers petitioner no support. *Connell* did not involve an 8(f) agreement, nor does the case at bar involve Section 8(b)(7)(C). Further, this Court recognized in *Connell* that there is special consideration given construction unions by virtue of Section 8(f), "which allows 'pre-hire' agreements in the construction industry, but only under careful safeguards preserving workers' rights to decline union representation." (421 U.S. at 632). Such safeguards were present in the case at bar, but the employer and its employees chose not to use them.

Petitioner would now seek to have this Court rewrite the Act by providing that an 8(f) contract can be voided by an employer, at will, even though the employer and employees failed to exercise any of the safeguards provided therein preserving the workers right to decline union representation. Such an amendment of course is proper only for the legislature; but more important, it would frustrate the very purpose of Section 8(f) in that it would permit an employer to tear up an 8(f) agreement as soon as it entered into one. Section 8(f) does not provide for nor even envisage so absurd and futile a result.

CONCLUSION

Petitioner presents no worthwhile reasons for granting the writ. Nor does the employer, Higdon, who did not file any petition for certiorari or even join in the Board's petition.

There is no need for this Court to take the time to reaffirm settled and correctly decided law because petitioner complains

it "is faced with the choice of either abandoning what it believes to be a correct interpretation of the Act or facing further reversal . . ." (Br. 20). Petitioner is wrong, two Courts of Appeal have held it is wrong, and a careful reading of the statute and of the record in this case again confirms petitioner's error.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December, 1976

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In the Supreme Court of the United States

OCTOBER TERM, 1976

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-719

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 535 F. 2d 87. The Board's decision and order (Pet. App. 14a-36a) are reported at 216 NLRB 45.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a-11a) was entered on March 31, 1976, and the Board's timely petitions for rehearing and rehear-

ing *en banc* were denied on June 25, 1976 (Pet. App. 12a–13a). On September 13, 1976, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 22, 1976. The petition was filed on that date and was granted on February 22, 1977 (App. 69).[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a pre-hire agreement between an employer and a union, entered into pursuant to Section 8(f) of the National Labor Relations Act, privileges recognitional picketing by a minority union which would otherwise violate Section 8(b)(7)(C) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

> Sec. 8. [29 U.S.C. 158] * * * (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such

[1] "App." refers to the Appendix to the brief herein.

> labor organization is currently certified as the representative of such employees:
>
> * * * * *
>
> (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: * * *
>
> * * * * *
>
> (f) It shall not be an unfair labor practice under subsection (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the be-

ginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

* * * * *

Sec. 9. [29 U.S.C. 159] (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

STATEMENT

In May 1973, Higdon Construction Company executed a contract with Glenmore Distilleries Company to erect a facility in Owensboro, Kentucky. The con-

tract with Glenmore required the contractor to "use union labor exclusively in the performance of this contract" (Pet. App. 29a). Accordingly, Higdon Construction sought to employ ironworkers for the job through respondent Union's[2] hiring hall. The Union refused to furnish employees unless Higdon Construction accepted an area-wide labor agreement which the Union had entered into with a multi-employer association.[3] Higdon Construction attempted at first to use non-union labor. However, after the Union and other labor organizations struck the Glenmore jobsite, Higdon Construction signed an acceptance of the Union's area-wide agreement on July 31, 1973. The agreement professed to cover all employees within the Union's geographic jurisdiction who performed iron work for signatory companies, and was to expire by its terms on March 31, 1976. The agreement contained no provision requiring employees hired by the employer to become union members within a specified period of time (commonly known as a "union security clause") and no provision requiring the employer to withhold Union dues from employee wages. (Pet. App. 3a–4a, 15a, 29a–31a; App. 28–29, 45.)

Higdon Construction complied fully with the agreement with respect to employees hired for the Glenmore job (Pet. App. 15a). However, in July 1973, Gerald Higdon, the sole owner of Higdon Construction, formed Higdon Contracting Company

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[2] Local 103 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO.

[3] The agreement is set out at App. 48–68.

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for the purpose of performing non-union ironwork jobs. Thereafter Higdon Contracting successfully bid on non-union jobs for W. R. Grace Company and Barmet Industries. After work on those jobs began in early 1974, the Union demanded that the prior agreement be applied to those jobs as well. Gerald Higdon refused, explaining that the very purpose of establishing Higdon Contracting was to have a company that could perform non-union work and thus be able to compete with other contractors for non-union jobs (Pet. App. 16a). In response, the Union picketed the jobs with signs stating (Pet. App. 17a):

> Higdon Construction Company is in violation of the agreement of the Iron Workers Local Number 103.

Picketing at the Grace jobsite began on January 29, 1974, and continued until March 1, 1974. The Union picketed the Barmet jobsite for five days in March 1974. (Pet. App. 15a–17a, 28a, 30a–31a; App. 30–32, 39.)

Neither on July 31, 1973, nor at any time thereafter did the Union have, or claim to have, the support of a majority of the employees of Higdon Construction or Higdon Contracting within an appropriate bargaining unit. At the time of the picketing of the Grace and Barmet jobsites the Union was not the certified representative of the Higdon Contracting or Higdon Construction employees. During the relevant periods, neither the Union, Higdon Construction, nor Higdon Contracting filed a petition for an election under Section 9 of the Act, 29 U.S.C. 159. (Pet. App. 15a, 17a, 31a; App. 29–30.)

Upon a charge filed by Higdon Contracting,[4] the Board found that the Union violated Section 8(b)(7)(C) of the Act, 29 U.S.C. 158(b)(7)(C), by picketing for recognition at the Grace jobsite for a period of more than 30 days when it did not represent a majority of Higdon's employees and when a petition for a representation election had not been filed.

The Board found that the agreement between the Union and Higdon was a valid "pre-hire agreement" sanctioned by Section 8(f) of the Act, 29 U.S.C. 158(f) (Pet. App. 31a). The Board also found that Higdon Contracting was the *alter ego* of Higdon Construction, that both companies constituted a single integrated entity under the Act, and that accordingly the Union's pre-hire agreement with Hig-

[4] The General Counsel of the Board refused to issue a complaint on the Union's charge that Higdon had violated Section 8(a)(1), (3), and (5) of the Act, 29 U.S.C. 158(a)(1), (3), and (5) (Pet. App. 17a). He also dismissed a charge filed by Higdon alleging that the Union's picketing violated Section 8(b)(4) of the Act, 29 U.S.C. 158(b)(4), the secondary boycott provision, on the ground that "the only purpose of the picketing was to require the Employer to honor its contract with [the Union]" (App. 43).

Pending a Board determination of the complaint which did issue on Higdon's Section 8(b)(7)(C) charge, the Board's General Counsel sought an injunction from the District Court for the Western District of Kentucky under Section 10(*l*) of the Act, 29 U.S.C. 160(*l*), seeking to enjoin the Union's picketing. Without deciding the merits of the General Counsel's Section 8(b)(7) claim, the district court denied injunctive relief on the grounds that, in view of the cessation of the picketing, there was not a sufficient likelihood of irreparable harm to warrant injunctive relief (App. 37–38). By stipulation of the parties, the transcript of the district court hearing was deemed to be part of the administrative record, and portions of the transcript are set forth at App. 11–38.

don Construction applied to both companies (Pet. App. 20a, n. 7). However, the Board rejected the Union's contention that its picketing of the Grace jobsite was privileged as a means of enforcing that agreement (Pet. App. 14a–21a). On the basis of its decision in *R. J. Smith Construction Co.*,[5] the Board held that, "although Section 8(f) of the Act clearly exempts a company and union from unfair labor practice liability for entering into a contract prior to establishment of the union as a majority representative, [it] does not protect the union from inquiry into its majority status during the contract term" (Pet. App. 17a–18a). Accordingly, the Board held that, "where a union never thereafter obtains majority status, the company does not violate Section 8(a)(5) and (d) of the Act by refusing to continue the bargaining relationship established and by unilaterally changing terms and conditions of employment set forth in the contract" (Pet. App. 18a). The Board concluded (*id.* at 20a):

> For the Board to allow the [Union] to picket to enforce an 8(f) agreement if an employer decides to ignore it, as the Employer herein has done with respect to nonunion jobs, which [the Union] could not enforce by means of obtaining an 8(a)(5) bargaining order, is to permit it to do by indirection what it could

[5] 191 NLRB 693, reversed *sub nom. Local 150, Operating Engineers* v. *National Labor Relations Board*, 480 F. 2d 1186 (C.A.D.C.), decision on remand, 208 NLRB 615. See also *Ruttmann Construction Co.*, 191 NLRB 701.

> not do directly, and in effect nullify our decision in *R. J. Smith* and its progeny that such contracts are voidable by either party if a union never thereafter obtains majority status.

The Board ordered the Union to cease its unlawful recognitional picketing (Pet. App. 22a–23a).

The court of appeals denied enforcement of the Board's order. Adhering to the view of Section 8(f) which it had previously expressed in reversing the Board's decision in *R. J. Smith*,[6] the court stated (Pet. App. 8a–9a; footnote omitted):

> [U]nions which are parties to pre-hire agreements have the right to complain of unfair labor practices, including alleged refusals by the employer to bargain collectively, before the union achieves a majority. Conversely, an employer who has entered into a validly executed Section 8(f) pre-hire agreement may, after a reasonable period, seek a representation election to challenge an enduring minority union. The Company here could have taken that step but did not. It was the Company, Higdon, which committed an unfair labor practice when, of its own motion, it refused to bargain collectively with the Union.

SUMMARY OF ARGUMENT

1. It is a fundamental principle of the National Labor Relations Act that employees shall be free to select their own bargaining representative and can-

[6] *Local 150, Operating Engineers* v. *National Labor Relations Board*, 480 F. 2d 1186 (C.A.D.C.).

not be bound by the terms of an agreement entered into by a labor organization that they have not freely selected as their own representative. Section 8(b)(7)(C) provides significant protection for those rights by prohibiting picketing by an uncertified union for the purpose of forcing the employer to recognize the union as the bargaining representative of his employees, for more than thirty days, unless a petition for an election has been filed within that period.

The Union's picketing here came squarely within the ban of Section 8(b)(7)(C). It is undisputed that the Union has never been certified as the representative of Higdon's employees. Nevertheless, the Union picketed Higdon for more than 30 days, during which time no representation election petition was filed. The purpose of the picketing was to compel Higdon to adhere to the pre-hire agreement executed in July 1973 and thus, in effect, to recognize the Union as the bargaining representative of Higdon's employees at the Grace jobsite.

2. Section 8(f) of the Act does not, either in language or purpose, privilege picketing by a minority union that would otherwise violate Section 8(b)(7)(C). Because of special characteristics of the construction industry, Congress provided in Section 8(f) that it shall not be an unfair labor practice for unions and employers in the construction industry to enter into collective bargaining agreements—commonly known as "pre-hire agreements"—before the majority status of the union has been established. Nothing in Section 8(f), however, suggests that such a pre-hire

agreement relieves the union of the obligation, until the agreement expires, to acquire the support of the majority of the employees later hired. Nor does Section 8(f) provide or suggest that pre-hire agreements permit signatory unions to impose, by prolonged picketing in violation of Section 8(b)(7)(C), contract terms upon employees who have never assented to them through representatives of their own choosing. Indeed, the legislative history of Section 8(f) demonstrates that Congress did not intend it to confer the kind of automatic representative status that the court of appeals' decision would create.

3. The Board's decisions in this and related cases properly accommodate the basic objectives of the Act, reflected in Section 8(b)(7)(C), with the specific objectives of Section 8(f). Those decisions serve the principal purpose of the Act by ensuring that minority unions may not coercively impose upon employers and their employees contract terms that the employees have not agreed to through their own chosen representatives, and by requiring construction unions to satisfy the same obligation to acquire and demonstrate majority support that the Act imposes on other unions. At the same time, the Board's decisions serve the objectives of Section 8(f) by permitting even minority unions a reasonable time—thirty days—to picket to enforce a pre-hire agreement while the union seeks majority support, by requiring an employer to honor pre-hire agreements and bargain with the union if the union in fact is supported

by a majority of the employees, and by permitting the union to picket more than thirty days if it files a petition for an election. While the Board's rulings do not accord pre-hire agreements the same degree of conclusive effect that the court of appeals would, they do ensure that such agreements will be sufficiently enforceable to satisfy Congress' purpose in sanctioning them without sacrificing Congress' basic commitment to the principle of employee free choice.

4. The Board's decision is consistent with decisions of this Court, which have recognized that the Act, to protect the basic principles of Section 7, places the primary burden upon unions to achieve and demonstrate majority support and not upon employers to demonstrate that the union does not have majority support. The court of appeals' decision has reversed that burden by permitting minority unions coercively to enforce recognition as the bargaining representative until an employer has initiated the election process and that process has been completed.

ARGUMENT

A PRE-HIRE AGREEMENT BETWEEN AN EMPLOYER AND A UNION, ENTERED INTO PURSUANT TO SECTION 8(f) OF THE ACT, DOES NOT PRIVILEGE RECOGNITIONAL PICKETING BY A MINORITY UNION WHICH WOULD OTHERWISE VIOLATE SECTION 8(b)(7)(C) OF THE ACT

A. THE UNION'S PICKETING CAME WITHIN THE PROSCRIPTION OF SECTION 8(b)(7)(C)

A fundamental tenet of the National Labor Relations Act, reflected in many of its provisions, is that employees shall have the right "to bargain collectively

through representatives of their own choosing." Section 7, 29 U.S.C. 157. Thus Section 9(a), 29 U.S.C. 159(a), provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit" for those purposes. Section 8(a)(5), 29 U.S.C. 158(a)(5), in turn, makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Similarly, as this Court has held, it is a violation of Section 8(a)(1) and (2) of the Act, 29 U.S.C. 158(a)(1) and (2), for an employer, and a violation of Section 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A), for a union, to enter into a bargaining agreement when the union does not represent a majority of the unit employees. *International Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 366 U.S. 731.

Section 8(b)(7), 29 U.S.C. 158(b)(7), enacted in 1959, provides a significant additional protection for the right of employees to choose their own bargaining representative. Section 8(b)(7)(C) makes it an unfair labor practice for a union that has not been certified by the Board as the employees' bargaining representative to engage in recognitional picketing[7] for more than a reasonable period of time, not to ex-

[7] That is, picketing for the purpose of "forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees." Section 8(b)(7).

ceed 30 days, unless a representation petition is filed with the Board within that time. If a timely petition is filed, Section 8(b)(7)(C) provides for an expedited election, thereby channeling the underlying question of representation into the election procedures of Section 9 of the Act and insuring that the representation question will be promptly resolved by the free choice of a majority of the employees concerned rather than by the ability of the employer and the employees to withstand the adverse economic impact of the picketing.[8] See *Dayton Typographical Union No. 57* v. *National Labor Relations Board*, 326 F. 2d 634, 636–638 (C.A.D.C.); *Department & Specialty Store Employees' Local 1265* v. *Brown*, 284 F. 2d 619, 625–627 (C.A. 9), certiorari denied, 366 U.S. 934; *International Hod Carriers, Local 840 (Blinne Construction Company)*, 135 NLRB 1153, 1156–1158. As this Court stated in *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 632:

> One of the major aims of the 1959 Act was to limit "top-down" organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees. Congress accomplished this goal by enacting § 8(b)(7), which restricts primary recognitional picketing * * *. Construction unions are fully covered by [this section].

[8] If a timely petition is filed, the picketing may continue until the election is held and the results are certified. If the union loses the election, continued recognitional picketing would violate Section 8(b)(7)(B), which bars recognitional picketing within 12 months of a valid election. On the other hand, if the union wins the election and is certified, continued picketing would be lawful under the express exception for picketing by a "currently certified" labor organization.

The Union's picketing here came squarely within the ban of Section 8(b)(7)(C). The Union has never been certified by the Board as the representative of Higdon's employees. Nor has it ever been selected by a majority of those employees as their representative. Nevertheless, the Union picketed Higdon for more than 30 days, during which time no representation petition was filed. The avowed purpose of the picketing was to compel Higdon to adhere to the prehire agreement executed in July 1973 and thus, in effect, to recognize the Union as the bargaining representative of Higdon's employees at the Grace jobsite. Moreover, the picketing in this case was for precisely the objective that Section 8(b)(7) was enacted to prevent—the coercive imposition on employees of a bargaining representative whom they have never selected.

Respondent Union, however, asserts that its picketing was not "recognitional picketing" within the meaning of Section 8(b)(7)(C)—that is, not for the purpose of "forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees"—but was merely to enforce the terms of its pre-hire agreement (Br. in Opp. 3–4). Respondent contends that "[t]he law is clear that, as the courts and the Board have all ruled, picketing by a union to secure compliance with an existing contract is not barred by Section 8(b)(7)(C)" (*id.* at 4). Although that contention does not

precisely state the law, it does not in any event support respondent's position.

As a general matter the Board and the courts have broadly applied Section 8(b)(7) to restrain recognitional picketing by uncertified unions, even when the union may in fact represent a majority of the employees and even when the picketing is in part for the purpose of protesting unfair labor practices by the employer, including the employer's alleged unlawful refusal to bargain with the union in violation of Section 8(a)(5). *Dayton Typographical Union No. 57* v. *National Labor Relations Board, supra*; *International Hod Carriers, Local 840* (*Blinne Construction Company*), *supra*.[9]

However, several decisions by the Board have recognized a limited qualification to the literal scope of Section 8(b)(7) in cases where an un-

[9] Both the Board in *International Hod Carriers, supra*, and the court in *Dayton Typographical Union, supra*, agreed that most employer unfair labor practices, including the union's claim that the employer had unlawfully refused to bargain with it in violation of Section 8(a)(5), would not constitute a defense to an 8(b)(7) charge against a union. However, the Board has indicated that, when a union actually files an 8(a)(5) charge that is subsequently found meritorious, picketing in support of a complaint based on that charge does not violate Section 8(b)(7). This qualification to the reach of Section 8(b)(7) is based on the fact that a meritorious 8(a)(5) charge presupposes that there is no issue of representation which an election would resolve. Accordingly, the Board has consistently rejected election petitions when an 8(a)(5) complaint has been issued, including petitons filed in the course of recognitional picketing. See *International Hod Carriers, supra*, 135 NLRB at 1166, n. 24. The court in *Dayton Typographical Union* did not directly address the Board's position on this matter since an 8(a)(5) charge was not filed there, and it is not relevant here since the Union's 8(a)(5) charge against Higdon was dismissed. See note 4, *supra*.

certified union representing a majority of the employees in an appropriate unit has been accorded recognition by the employer. Thus, where an employer has voluntarily recognized such a union and has entered into a labor agreement with it, the Board has held that picketing to enforce that agreement, or succeeding agreements, does not violate Section 8(b)(7) although the picketing in fact constitutes an attempt by the union to force the employer to bargain with it. *Building and Construction Trades Council of Santa Barbara County* (*Sullivan Electric Company*), 146 NLRB 1086. See, also, *Bay Counties District Council of Carpenters* (*Disney Roofing and Material Company*), 154 NLRB 1598, 1605, enforced on other grounds, 382 F. 2d 593 (C.A. 9), certiorari denied, 389 U.S. 1037. Since the primary purpose of Section 8(b)(7) was to restrain picketing designed to coerce employer recognition of the union as the bargaining representative, the Board has correctly concluded that that section was not intended to apply to situations in which the employer has already recognized the union as the Section 9(a), or majority, representative of its employees. 146 NLRB at 1087.[10]

[10] It is, of course, well settled that the refusal of an employer to comply with the terms of an agreement entered into with a majority representative constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) that may be remedied by a bargaining order. See *National Labor Relations Board* v. *Hyde's Supermarket*, 339 F. 2d 568, 571–573 (C.A. 9). Moreover, such a contract carries with it a presumption that the union's initial majority status has continued. *Eastern Washington Distributing Co., Inc.*, 216 NLRB 1149, 1153; *Dayton Motels, Inc.*, 192 NLRB 674, 678, enforced, 474 F. 2d 328, 525 F. 2d 476 (C.A. 6). Cf. *Hexton Furniture Co.*, 111 NLRB 342, 344.

That qualification, which is based not upon the existence of a contract but upon the employer's previous recognition of the union as the representative of a majority of its employees, does not apply to the respondent Union here. The employer, Higdon, never recognized the Union as the Section 9(a) representative of its employees. And, neither at the time the contract was entered into nor at the time of its attempted application at the Grace jobsite, did the Union represent a majority of Higdon's employees. In these circumstances, picketing to force Higdon to adhere to the terms of a labor agreement clearly constituted picketing for the purpose of "forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees" in violation of Section 8(b)(7)(C)."

At most, the Union's claim that its picketing was not recognitional but was instead picketing to enforce an agreement merely restates the issue in the case—whether Section 8(f) itself establishes that a union

" Contrary to the Union's contention (Br. in Opp. 2), there is no inconsistency between this conclusion and the fact that the General Counsel dismissed Higdon's 8(b)(4)" charge against the Union (note 4, *supra*) for the reason that "the only purpose of the picketing was to require the Employer to honor its contract with [the Union]." The General Counsel was indicating that the evidence did not disclose a secondary boycott objective; he had no occasion to pass on the question, presented by Higdon's pending 8(b)(7)(C) charge, whether the contract sought to be enforced afforded a defense to picketing which would otherwise violate Section 8(b)(7)(C).

signatory to a pre-hire agreement shall be deemed by operation of law to be the recognized bargaining representative of all employees subsequently hired until the agreement expires or the union is ousted by an employer-initiated Board election. As we demonstrate below, neither the language of Section 8(f) nor its legislative history supports that conclusion, or in any way suggests that Congress intended so sweeping a qualification of the Act's major premise that employees shall be represented by bargaining agents of their own choosing.

B. THE UNION'S PRE-HIRE AGREEMENT DID NOT REMOVE ITS PICKETING FROM THE PROHIBITIONS OF SECTION 8(b)(7)(C)

1. Section 8(f) of the Act provides no exception to Section 8(b)(7)(C)'s prohibition of recognitional picketing by an uncertified union for more than thirty days. Section 8(f) merely declares that it shall not be an unfair labor practice for employers and unions in the construction industry "to make an agreement covering employees engaged (or who, upon their employment, will be engaged)" in that industry before the majority status of the union has been established.

Congress enacted Section 8(f) in 1959 as a limited exception for employers and unions in the construction industry from the general rule under the Act that collective bargaining agreements can be concluded only after the union has been selected by the majority of

the employees is an appropriate unit.[12] The exception was enacted in recognition of special characteristics of the construction industry—primarily the short-term nature of most construction projects—which often made it impractical for employers and unions to conclude meaningful agreements and thus deprived employers of the assurances they needed concerning their source of labor and their anticipated labor costs before bidding for or commencing projects. As the Senate Committee on Labor and Welfare explained the purposes of Section 8(f):

> In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated. The

[12] As noted (*supra*, p. 13), ordinarily an employer would violate Section 8(a)(1) and (2) of the Act, and the union Section 8(b)(1)(A), by entering into a bargaining agreement before the union has acquired the support of a majority of the unit employees. Indeed, in *International Ladies' Garment Workers' Union* v. *National Labor Relations Board*, *supra*, the Court held that an agreement between an employer and a minority union constituted unfair labor practices even though both the union and the employer believed in good faith that the union had majority support.

Moreover, whether the union has a majority is ordinarily to be determined only after a representative employee complement has been hired. See *The Lukas-Harold Corp.*, 44 NLRB 730; *Solar Aircraft Company*, 48 NLRB 242; cf. *Sardik Food Products Corp.*, 46 NLRB 894, 896.

> practice of signing such agreements for future employment is not entirely consistent with Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired. One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired. [S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959); I Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, 86th Cong., 1st Sess. 424 (G.P.O. 1959), hereafter "Leg. Hist. (1959)".][13]

[13] Under the Wagner Act, the Board generally did not assert jurisdiction over the construction industry, considering the operations of most construction contractors not to be involved in commerce. See *Brown and Root, Inc.*, 51 NLRB 820. After enactment of the Taft-Hartley Act, in 1947, the Board assumed jurisdiction over the construction industry and the incompatibility between the Board's representation principles and procedures and the characteristics of that industry became pronounced. The difficulty of holding representation elections in that industry was explained as follows by General Counsel Bott, at a Senate hearing, in 1951,

Section 8(f) attempted to meet this problem by permitting an employer and a union in the construction industry to enter into a pre-hire agreement without committing an unfair labor practice.

Nothing in the language of Section 8(f), however, suggests that it was designed to confer upon a union that is a party to a pre-hire agreement the kind of representative status that would support a Section 8(a)(5) bargaining order against an employer who refused to bargain with it, or that would exempt the union from the restrictions on recognitional picketing in Section 8(b)(7). Indeed, the language and structure of the Act suggest precisely the opposite.

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on a bill which, like Section 8(f), would, *inter alia*, have authorized pre-hire agreements in the construction industry:

"The complement of employees changes from job to job. The complement consists of a pool of craftsmen or workmen from which all the contractors in the trade draw for their labor. The workmen, both skilled and unskilled, are constantly moving from job to job. No single employer can be identified as their employer in the conventional sense.They may work for a dozen different contractors in a single year.

"An appropriate unit of employees ordinarily implies a definite employer employing identifiable employees. If the unit were to be defined on the particular construction project the contractor's work on the project might be completed by the time an election could be held. Conducting elections throughout the industry on this basis might disenfranchise craftsmen not actually employed on the voting eligibility dates fixed by the Board or at the time of the actual election." (Hearings on S. 1973 before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare, 82d Cong., 1st Sess. 190 (1951).)

See also S. Rep. No. 1509, 82d Cong., 2d Sess. 3–6 (1952).

Significantly, Congress in 1959 did not, in Section 8(f) or elsewhere, modify Section 8(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9(a)*" (emphasis supplied). Section 9(a) provides that the exclusive bargaining representative shall be a representative selected "by the *majority* of the employees in a unit appropriate for such purposes * * *" (emphasis supplied). Accordingly, the Board in this case correctly concluded that concluded that (Pet. App. 20a):

> [T]o allow the [Union] to picket to enforce an 8(f) agreement * * * which [the Union] could not enforce by means of obtaining an 8(a)(5) bargaining order, is to permit it to do by indirection what it could not do directly * * *.

Furthermore, while the Board's well-established contract bar rules prevent the Board from entertaining an election petition during the term of an ordinary contract with a Section 9(a) majority representative,[14] pre-hire agreements do not have a similar effect, since Section 8(f) expressly provides that a pre-hire agreement "shall not be a bar" to the filing of a petition for a representation election under Section 9(c).[15] In short, the language of Section 8(f) and its relationship to other provisions of the Act reflect that Section 8(f) was not intended to relieve unions that

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[14] See *Hexton Furniture Co.*, 111 NLRB 342, 344; *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1000.

[15] The proviso also provides for the filing of a petition for an election under Section 9(e), 29 U.S.C. 159(e), to deauthorize the union security provision of the contract (if there is one).

are parties to pre-hire agreements from the obligation to achieve majority support before they can require an employer to honor such an agreement by means of Section 8(a)(5), or to accord such unions the kind of recognition as the bargaining representative that would exempt them from the recognitional picketing prohibitions of Section 8(b)(7).

The legislative history of Section 8(f) confirms that Congress did not intend its authorization of pre-hire agreements in the construction industry to confer automatic representative status on the union or to obviate the union's obligation to acquire majority support. Congress rejected a proposal that would have permitted the Board to certify a union signing a pre-hire agreement as the employees' representative without an election or other proof of majority support merely upon a showing of a history of bargaining between the union and the employer.[16] Instead, as

[16] The Landrum-Griffin bill contained a provision permitting such certification. See Sec. 702 of H.R. 8400, 86th Cong., 1st Sess., I Leg. Hist. (1959) 678–679. See also 105 Cong. Rec. 6431, II Leg. Hist. (1959) 1082 (Senator Goldwater); 105 Cong. Rec. 15541–15542, II Leg. Hist. (1959) 1578 (analysis by Representatives Thompson and Udall). The certification would have cloaked the union with representation and bargaining rights for at least one year. See *Brooks* v. *National Labor Relations Board*, 348 U.S. 96. In conference, the Landrum-Griffin provision was rejected in favor of the present Section 8(f) (contained in the Senate bill) which permitted employers and unions in the construction industry to enter into pre-hire agreements even where there had been no bargaining history, but left the union vulnerable to unseating if it did not thereafter acquire majority support. See 105 Cong. Rec. 17899, II Leg. Hist. (1959) 1432 (Senator Kennedy); 105 Cong. Rec. 18135, II Leg. Hist. (1959) 1922 (Representative Udall).

noted, Congress provided that the representative status of the union could be challenged at any time. As this Court stated in *Connell, supra,* 421 U.S. at 632:

> The only special consideration given [construction unions] in organizational campaigns is §8(f), which allows "pre-hire" agreements in the construction industry, but only under careful safeguards preserving workers' rights to decline union representation. * * *

2. The court of appeals erred in concluding that the Board's position violates the purpose of Section 8(f) by making pre-hire agreements "virtually unenforceable." *Local 150, Operating Engineers* v. *National Labor Relations Board,* 480 F. 2d 1186, 1190 (C.A.D.C.). The Board's decisions in this and other Section 8(f) cases are consistent with the language and intent of Section 8(f), and properly accommodate the purposes of that section with the basic principles of the Act, reflect in Section 8(b)(7).

The Board's decisions under Section 8(f) reveal a consistent rationale. For example, in *R. J. Smith Company, supra,* the Board held that an employer did not violate Section 8(a)(5) when it failed to honor the terms of a pre-hire agreement entered into with a union that concededly did not represent the majority of the employer's employees. Although the case presented no picketing issue, the Board concluded that Section 8(f) was intended "to immunize from liability only the preliminary contractual steps which precede an employer's acquisition of a work force * * *." 191 NLRB at 694. The Board reasoned that, since Section 8(f) expressly permits an

election petition to test the majority status of a union with a pre-hire contract, it would be anomalous to conclude that an employer could not test that status in the context of litigating a Section 8(a)(5) charge (*ibid.*)."[17] The Board's decision made clear, however, that if such a union, either in an election or in unfair labor practice litigation, demonstrates its majority status, the employer will have violated Section 8(a)(5) by refusing to recognize it and honor the agreement. The Board also indicated that, in certain circumstances, a Section 8(f) agreement might create a presumption of majority status, which it would be incumbent on the employer to rebut. "This might occur, for example, when a union-security agreement is present in the 8(f) contract and has been enforced. That is not the case here." 191 NLRB at 695, n. 5.[18] The Board applied those principles in *National Labor Relations Board* v. *Irvin-McKelvy*, 475 F. 2d 1265 (C.A. 3), enforcing in relevant part 194 NLRB 52, when it found that an employer violated Section 8(a)(5) when it refused to honor a pre-hire agreement that contained a union-security clause that was enforced and that therefore resulted in a majority of

[17] See also *Ruttmann Construction Co.*, 191 NLRB 701, where the Board declined to find an 8(a)(5) violation by an employer who repudiated a pre-hire agreement with a minority union by signing and enforcing another pre-hire agreement with another union.

[18] As noted, the court of appeals reversed the Board's decision in *Local 150, Operating Engineers* v. *National Labor Relations Board*, 480 F. 2d 1186 (C.A.D.C.).

the employees' being union members."[19] In the instant case, the Board applied the foregoing principles to a Section 8(b)(7)(C) context, and held that, since the employer was not required to honor the pre-hire agreement with respect to projects where the Union did not have the support of a majority of the employees, the Union was not permitted to force compliance by picketing in violation of Section 8(b)(7).

In summary, these principles may be distilled from the Board decisions above: Where a union with a pre-hire agreement does not in fact represent a majority of the employees, the employer is not required to comply with the agreement and the union is not permitted to force such compliance by prolonged recognitional picketing. If the union does in fact represent a majority, the employer is required to honor the agreement and the union does not violate Section 8(b)(7) by picketing to force compliance. Whether the union represents a majority is a fact that may be litigated in an unfair labor practice proceeding under Section 8(a)(5) or 8(b)(7), and majority status will be presumed (subject to rebuttal by the employer) where there is an operative union security clause in the pre-hire agreement. Furthermore, even when a union in fact lacks majority support, picketing by the union for more than thirty days will not violate Section 8(b)(7)(C) if it files a petition for an election within that period.

[19] The court of appeals affirmed that finding, and expressly reserved the question of "how we would rule if presented with the repudiation during its term by a § 8(f) employer of a collective bargaining agreement containing no union security provisions * * *." 475 F. 2d at 1271.

While the foregoing principles do not give conclusive effect to pre-hire agreements, they by no means render pre-hire agreements "an exercise in futility" or "virtually unenforceable";[20] rather, they provide reasonable assurance that such agreements will have the effect and serve the purposes which Congress intended in sanctioning them. Employers and unions in the construction industry are able to enter into pre-hire agreements that will provide the employer with the needed certainty in determining his costs and with a ready supply of skilled labor. Where, as Congress assumed would generally be the case, the union does represent a majority of the employees later hired, the union can enforce adherence to the pre-hire contract, through unfair labor practice proceedings or picketing, just as a union signatory to a standard collective agreement could do. Thus, even when the employer entertains doubt as to the union's majority support among his employees, his repudiation of a pre-hire agreement would run considerable risk—apart from the ill-will it would be likely to generate[21]—of exposing him to Section 8(a)(5) liability

[20] *Local 150, supra*, 480 F. 2d at 1190.

[21] In most cases, of course, as Congress assumed, employers in the construction industry will not unilaterally abrogate pre-hire agreements. There are natural disincentives to prevent businessmen, who must deal on a continuing basis with labor organizations, from freely repudiating their agreements, even though such agreements may not be enforceable in court. The instant case is an example: Higdon complied fully with the pre-hire agreement on the project in connection with which he signed it. He simply declined to apply it to subsequent projects where a majority of the employees were non-union.

(and a consequent bargaining order and other affirmative relief), since the union might subsequently demonstrate that it in fact had majority support.[22] Finally, even if the union does not acquire the support of a majority of the employees hired immediately after the commencement of a project, Section 8(b)(7)(C) provides the union with a reasonable period of time (up to thirty days) to picket to enforce the agreement while it attempts to obtain majority support.

The court of appeals' decision, on the other hand, would significantly abridge the Act's basic principle that employees shall be represented for collective bargaining purposes only by representatives whom a majority of the employees have freely selected. It would mean that a minority union could compel an employer to comply with a pre-hire agreement, whether through a Section 8(a)(5) bargaining order or unlimited picketing, for the entire term of the agreement or until the Board completes an election initiated by the employer's petition. Under the court's

[22] If the pre-hire agreement contains a union-security clause, the employer's risk is enhanced, since he will be required to overcome the presumption of the union's majority support flowing from the existence of such clause. Moreover, that the employer may have entertained good faith doubts as to the union's majority status would not be a defense to an 8(a)(5) charge if the union in fact had acquired majority support. Just as an employer's erroneous good faith belief in the union's majority status is not a defense to a charge that the employer violated Section 8(a)(1) and (2) by concluding an agreement with a minority union. See *International Ladies' Garment Workers' Union* v. *National Labor Relations Board, supra.*

view an employer would be bound by a pre-hire agreement not only in cases where his employees desire no union but also even in cases where most of his employees are members of another union. In short, the court's decision would significantly lessen the incentives of a union with a pre-hire agreement to acquire the support of a majority of the employees subsequently hired and would pose the very danger of "top-down" organizing that Section 8(b)(7) was designed to prevent—namely, that the support such a union may eventually acquire is the result not of the employees' free choice but of the coercion inherent in protracted picketing.

Notwithstanding those consequences, the court of appeals concluded (Pet. App. 9a) [23] that the final proviso of Section 8(f), which permits unions, employers, or groups of employees to petition for an election during the term of a pre-hire agreement, was intended to constitute the employer's exclusive means of obtaining release from a pre-hire contract or of restraining protracted picketing by a minority union. That conclusion is erroneous. The language of the final proviso is plainly permissive. It states that a pre-hire agreement "shall not be a bar" to an election petition under Section 9 (c) or (e), but does not require such a petition. If an employer has doubts about a union's majority support, he may protect himself from possible liability under Section 8(a)(5) by filing a petition.

[23] See, also, *Local 150*, *supra*, 480 F. 2d at 1189–1191.

But to hold that he must file a petition, or else abide by a pre-hire agreement or suffer prolonged picketing by a minority union, is in effect to accord the union the very presumption of representative status that Congress specifically declined to confer in enacting Section 8(f).

Similarly, there is no basis for the court's view that the Board's decisions under Section 8(f) render pre-hire agreements "virtually unenforceable." As we have shown (pp. 25–29, *supra*), the Board's decisions accord considerable significance and "enforceability" to pre-hire agreements. But, in any event, the Board's position does not make pre-hire agreements more "unenforceable" than the decision of the court of appeals. Under the court's decision a pre-hire agreement becomes unenforceable after a Board election, initiated by the employer's petition, determines that the union lacks majority support. The significant difference between the court's position and the Board's relates to *when* the agreement becomes unenforceable and who has the burden of triggering the determining event. The Board's position, unlike the court's, is consistent with the basic principles of the Act, which impose an affirmative obligation on unions to achieve and demonstrate majority support.

3. This Court, in analogous circumstances, has recently reaffirmed the principles which also support the Board's decisions under Section 8(f). In *Linden Lumber Division* v. *National Labor Relations Board*,

419 U.S. 301, the Court held that an employer, even when confronted with union authorization cards signed by a majority of its employees, is not required by the Act to petition for an election before it may decline to bargain with the union. There, as in this case, the court of appeals had concluded that Congress, by permitting employers to petition for elections under Section 9, intended to make the filing of a petition the only means of contesting the union's majority status. This Court rejected that view, holding that the Act places the burden on the union to establish its majority.[24] As the Court observed, "[l]arge issues ride on who takes the initiative." 419 U.S. at 308. That observation is particularly pertinent here, where the union does not even claim to represent a majority of the employees. To require employers in those circumstances to abide by a pre-hire agreement until they petition for an election to formalize the union's lack of majority support is contrary to the Act's fundamental principle that employees shall have the right "to bargain collectively through representa-

[24] Similarly, even where the employer has entered into a conventional bargaining agreement with a union which is a Section 9(a) representative, at the end of the contract period the employer is not limited to filing a petition under Section 9(c) to attempt to unseat the union. It may simply withdraw recognition if it has reasonable grounds for believing that the union has lost its majority, and proof of such grounds would constitute a defense to any complaint alleging a refusal to bargain in violation of Section 8(a)(5). See *Lodges 1746 and 743, International Association of Machinists* v. *National Labor Relations Board (United Aircraft Corp.)*, 416 F. 2d 809 (C.A.D.C.), certiorari denied, 396 U.S. 1058; *Celanese Corp. of America*, 95 NLRB 664, 671–673.

tives of their own choosing" (Section 7, 29 U.S.C. 157), and to this Court's admonition that the 1959 amendments to the Act were designed to limit "top-down" organizing practices. *Connell, supra,* 421 U.S. at 632.[25]

Furthermore, *Linden Lumber* undercuts the conclusion of the court of appeals here that permitting an employer to decline to bargain with a union with a pre-hire agreement until the union demonstrates its majority status in an election initiated by the union would encourage "flagrant unfair labor practices"[26] by the employer designed to discourage union membership. In view of the sanctions of Section 8(a)(1) (and the injunctive remedies available to the Board under Section 10(j), 29 U.S.C. 160(j)), the basis

[25] Indeed, in one respect, the Board's rules under Section 8(f) accord greater effect to pre-hire agreements than the principles of *Linden Lumber* would require. Under *Linden Lumber*, an employer who rejects a claim for recognition and bargaining by a union that presents evidence of majority support does not violate Section 8(a)(5) even if it is subsequently shown that the union in fact had majority support—at least so long as the employer does not commit other unfair labor practices that would undermine the election process (*National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575). The employer may simply insist that the union seek an election. As noted, *supra*, under Section 8(f), however, an employer who does not comply with a pre-hire agreement will be found to have violated Section 8(a)(5) if it is subsequently shown that the union in fact had majority support. The higher standard in the 8(f) context serves to assure that employers will not freely ignore pre-hire agreements, and thus effectuates the purpose of Section 8(f) without sacrificing the basic principle of employee freedom of choice.

[26] *Local 150, supra*, 480 F. 2d at 1190.

for the court of appeals' concern is not clear.[27] In any event, the potential for abuse is no different from that in the *Linden Lumber* context, where the Court nevertheless placed the burden of seeking an election squarely on the union. Moreover, here, as in *Linden Lumber,* there was no evidence of unfair labor practices by the employer.

Finally, the Board's decision in this and related cases represents a reasonable resolution of various policies of the Act that the Board has evolved over a number of years on the basis of its familiarity with the statute and with the practical problems of the industry. In *Linden Lumber* this Court confirmed the special role of the Board with respect to questions of this kind, saying (419 U.S. at 309–310):

> The Board has at least some expertise in these matters and its judgment is that an employer's petition for an election, though permissible, is not the required course. * * *
>
> In light of the statutory scheme and the practical administrative procedural questions involved, we cannot say that the Board's decision * * * was arbitrary and capricious or an abuse of discretion.

We submit that those considerations apply fully here and that the Board's decision "fall[s] well within that category of situations in which the courts should defer to the agency's understanding of the statute which

[27] Indeed, the court of appeals' position poses a far more significant danger—namely, that unions will be able to coerce employee support through such tactics as protracted picketing.

it administers." *National Labor Relations Board* v. *Enterprise Assn.*, No. 75–777, decided February 22, 1977, slip op. 20.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to enforce the Board's order.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-719

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL-CIO, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Petitioner's statement of the question presented is incorrect.

The question presented is, as stated in the opinion of the Court of Appeals:

"Whether an employer can abrogate unilaterlly and breach a validly executed collective bargaining prehire agreement merely because the agreement was a prehire agreement in the construction industry validly entered into pursuant to Section 8(f) of the National Labor Relations Act." (Pet. App. 2a).

STATEMENT

Petitioner's Statement glosses over or omits many important facts of record, which are undisputed.

The union and the employer, hereinafter called Higdon, have had a collective bargaining relationship and have entered into labor agreements for at least eight years, since 1965. (App. 19, 23).[1]

The employer, which had used the name Higdon Construction Company, formed a new corporation, known as Higdon Contracting Company, solely "in order to get around the contract" which it had entered into with the union. (App. 33).

The employer then violated and breached the contract. The union then commenced picketing the employer for the sole purpose of attempting to secure compliance with the contract and its picket sign at all times carried the following inscription:

> "Higdon Construction Company is in violation of the agreement of the Iron Workers Local Number 103." (Pet. App. 9a, 17a).

The union then filed an unfair labor practice charge against Higdon, charging that it had violated Sections 8(a)(1), (3), and (5) of the Act, but the Board summarily dismissed same, for the reason that "the only purpose of the picketing was to require the employer to honor its contract with Bridge, Structural and Ornanmental Iron Workers, Local 103." (Pet. App. 9a, 17a; App. 43).

Upon a charge filed by Higdon, that the union had violated Section 8(b)(7)(C) of the Act by picketing for more than thirty

[1] ("App." refers to the Appendix to NLRB's Brief.)

days without filing a petition for an election, a complaint was issued against the union, and the Board applied for an injunction to enjoin the picketing complained of. The District Court refused to grant the Board an injunction, condemning the unconscionable attempt by the employer to evade its contractual obligation as "corporate gymnastics". (App. 38).

The Administrative Law Judge recommended that the complaint be dismissed, pointing out that Section 8(b)(7)(C) did not apply because it was intended to proscribe picketing having as its object, forcing an employer's initial acceptance of the union as the bargaining representative of its employees, and not picketing such as in the case at bar which was for the sole object of requiring an employer to live up to and comply with a valid collective bargaining agreement. The Administrative Law Judge also sharply condemned the tactics of the employer in this case as "chicanery", "a subterfuge and a sham. This blow hot, blow cold stance of the employer . . ." (Pet. App. 33a-36a).

The Board reversed the decision of its Administrative Law Judge, because it chose to follow its decision in *R. J. Smith Construction Company, Inc.*, 191 NLRB 693, where it held "that a pre-hire agreement, although validly executed for a fixed term of years, is effective only so long as both parties wish to adhere to it and may be ignored with impunity . . . by either party at any time . . ." (Pet. App. 32a, 20a; App. 12). This has been the Board's position throughout this litigation, from the time of the opening statement of its General Counsel. (App. 12).

The Board's decision was reversed by the Court of Appeals in a decision written by Judge Danaher, which held, following an earlier decision of the same Court and a decision of the Court of Appeals for the Third Circuit, that pre-hire agreements validly entered into under Section 8(f) of the Act cannot be abrogated by either party at will. The Board petition for rehearing *en banc* was denied. (Pet. App. 1a-13a).

SUMMARY OF ARGUMENT

1. Petitioner's position is that an employer can unilaterally abrogate a validly executed pre-hire agreement, and can commit unfair labor practices, merely because the union has not established that it had a majority status. There is nothing in the language, history, or policy of Section 8(f) to justify or even permit this construction, and the two Courts of Appeals which have ruled on the question, have both ruled squarely against the petitioner.

2. Basic to the framework of the National Labor Relations Act, and the effectuation of its purposes to achieve stability in labor relations, is good faith bargaining between an employer and a union, leading to a collective bargaining agreement which is binding on both sides. But the Board's decision which Petitioner seeks to enforce would do the opposite—by encouraging parties to abrogate validly executed agreements, it would undermine good faith bargaining, stability in labor relations and the sanctity of contractual obligations.

3. Petitioner's entire case is based on its misstatement that when respondent union engaged in picketing to protest the employer's breach of its lawful agreement, the union was engaged in "recognitional picketing".

The record is undisputed, the Administrative Law Judge, the Board itself and the Court of Appeals all found that, as the Court below stated, "The union here . . . had been picketing to secure compliance with an existing contract valid under Section 8(f), . . ." (Pet. App. 9a, ft. 4). The Board itself has repeatedly ruled that it is only *initial* picketing to secure *initial* recognition of the union which is "recognitional" picketing which falls within the ambit of Section 8(b)(7)(C). This was not the case here, for the union and the employer have had a

contractual bargaining relationship and have entered into labor agreements for at least eight years, since 1965. (App. 19, 23).

4. Petitioner's interpretation would create two kinds of collective bargaining agreements—those which are valid for their term, and another kind which can be unilaterally abrogated by the parties at will. Not only is such an interpretation directly contrary to the wording of the Act, but it would create substantial industrial unrest, directly contrary to the purposes of the Act. Section 8(f) provides ample safeguards to protect workers from pre-hire agreements which are not to their desire or best interests—elections which can be petitioned for by the employees, or the employer, at any time. Such safeguards are ample, they were present at the case at bar, but the employer and its employees chose not to use them.

5. This case illustrates some of the undesirable effects of the Board's misreading the Act—it has encouraged flagrant unfair labor practices, as the Court of Appeals had warned, by an employer who was guilty of subterfuge and chicanery. The Board's decision, which was properly reversed by the Court of Appeals, sought to legitimize an illegal "blow hot, blow cold stance" which permits an employer to adhere to a contract for only those purposes which suit it. Such a practice would undermine the very bedrock of good faith collective bargaining and the purposes of the Act, and allow the parties to destroy the binding effect of and nullify valid labor contracts.

ARGUMENT

An Employer Cannot Unilaterally Abrogate and Breach a Collective Bargaining Agreement Merely Because the Agreement Is a Pre-Hire Agreement in the Construction Industry Validly Entered Into Pursuant to Section 8(f) of the National Labor Relations Act.

A. **The Board's position in this case contravenes the wording and the purpose of Section 8(f) by making pre-hire agreements virtually unenforceable.**

As the Court of Appeals correctly ruled, the Board's position contravenes the wording as well as the purpose of Section 8(f) by making pre-hire agreements virtually unenforceable.

Petitioner states: "Where a union with a pre-hire agreement does not in fact represent a majority of the employees, the employer is not required to comply with the agreement . . ." (Brief 27). Thus, any time an employer wants to repudiate a valid 8(f) agreement, all it has to do is to contend the union does not in fact represent a majority of its employees.

This contention of petitioner is absurd, as Judges McGowan, Winter and MacKinnon, pointed out four years ago in their decision in *Local 150, Operating Engineers v. NLRB*, 156 U.S. App. D.C. 294, 480 F. 2d 1186, 1190 (1973):

> ". . . we cannot conceive of such an exercise in futility on the part of Congress as to validate a contract with a union having minority status, but to permit its abrogation because of the union's minority status. The Board's interpretation . . . would frustrate Congress' purpose of approving pre-hire agreements in the construction industry, for it would render them voidable at will." 480 F. 2d at p. 1190.

Petitioner's contention that this fact has to be determined by being "litigated in an unfair labor practice proceeding" is also absurd. (Brief 27).

First of all, Section 8(f) provides specific safeguards for an employer and its employees who do not wish to be bound by an 8(f) contract, or be represented by the union which executed same, by providing that the employer or the employees can petition for an election *at any time*.

Second, the Act itself makes no such requirement that an 8(f) pre-hire agreement is valid only where the union's majority status has been litigated in an unfair labor practice proceeding.

Third, the Act does not establish two kinds of labor agreements—those which are binding, and those which are binding only if the union shows it has a majority in an unfair labor practice proceeding. Reading such language into the Act is not an interpretation or even amendment of it—it is an evisceration of the very guts of collective bargaining—the good faith expectation that each side will make every effort to live up to the agreement that it enters into.

If Congress had wanted to provide that an 8(f) agreement is binding only if the union subsequently demonstrates its majority status, it would have said so in the Act. There is absolutely nothing in the legislative history or the language or policy of Section 8(f) to justify such contention.

Petitioner's concern for "top down" organizing practices is misplaced. Section 8(f) gives ample and full protection against this, as the Court of Appeals found, by its provision that even though an 8(f) contract is entered into, the employees or the employer can petition for an election *at any time*.

Therefore, *Connell Construction Company, Inc v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, is not applicable to the

case at bar and offers petitioner no support. *Connell* did not involve an 8(f) agreement, nor does the case at bar involve Section 8(b)(7)(C). Further, this Court recognized in *Connell* that there is special consideration given construction unions by virtue of Section 8(f), "which allows 'pre-hire' agreements in the construction industry, but only under careful safeguards preserving workers' rights to decline union representation." (421 U.S. at 632). These safeguards were present in the case at bar, but the employer and its employees chose not to use them.

Petitioner would now seek to have this Court rewrite the Act by providing that an 8(f) contract can be voided by an employer, at will, even though the employer and employees failed to exercise any of the safeguards provided therein preserving the workers' right to decline union representation. Such an amendment is proper only for the legislature; but more important, it would frustrate the very purpose of Congress in enacting Section 8(f) in that it would permit an employer to tear up an 8(f) agreement as soon as it entered into one. Section 8(f) does not provide for nor even envisage so absurd and futile a result.

This is exactly what the Court of Appeals for the District of Columbia properly ruled in the decision below, and in following its precedent in *Local No. 150*, four years ago, when it held:

> ". . . we can find no sanction in the language, history or policy of Section 8(f) for permitting an employer to abrogate unilaterally a validity executed prehire agreement or for permitting the employer to commit what is otherwise an unfair labor practice even though at the time of either the union has not achieved majority status." *Local No. 150, International Union of Operating Engineers AFL-CIO v. N.L.R.B.*, 156 U.S. App. D.C. 294, 480 F. 2d 1186, 1190 (1973).

Petitioner's attempt to distinguish *NLRB v. Irvin-McKelvy*, 475 F. 2d 1265, 1271 (C.A. 3, 1973), on the ground that that

contract contained a union security clause, is without substance. If the Board's position were upheld, that a Section 8(f) agreement is binding only if it contains a union security clause, this would not be an interpretation, but an amendment of the Act.

Further, the Court of Appeals in *Irvin-McKelvy* squarely held that:

> "Nothing in neither the text nor the legislative history of Section 8(f) suggests that it was intended to leave construction industry employers free to repudiate contracts at will." *NLRB v. Irvin-McKelvy*, 475 F. 2d 1265, 1271 (C.A. 3, 1973).

Yet, this is the essence of the Board's decision in the case at bar.

B. **Respondent union's picketing in this case was for the purpose of securing compliance with a valid collective bargaining agreement. The law is clear that such picketing is not recognitional picketing, particularly where the union and the employer had been engaged in collective bargaining and had entered into labor agreements for nine years. Therefore Section 8(b)(7)(C) does not apply.**

Petitioner's case is based upon its misstating the issue by contending that the picketing of the union, admittedly to protest the employer's breach of an admittedly valid collective bargaining agreement, was "recognitional picketing".

Not only does this fly in the face of the Record, the findings of the Administrative Law Judge, of the Board itself and of the Court of Appeals, that "The union here . . . had been picketing to secure compliance with an existing contract valid under Section 8(f). . . .", but this flies in the face of well estab-

lished law. The law is clear that, as the courts and the Board have all ruled, picketing by a union to secure compliance with an existing contract is not barred by Section 8(b)(7)(C). *Bay Counties District Council of Carpenters, etc.* (1965), 154 NLRB 1598, enf. 382 F. 2d 593 (C.A. 9, 1967); *Building and Construction Trades Council of Santa Barbara County* (Sullivan Electric Company), 146 NLRB 1086.

Petitioner even admits this in its brief when it states, "Thus, where an employer has voluntarily recognized such a union and has entered into a labor agreement with it, the Board has held that picketing to enforce that agreement, or succeeding agreements, does not violate Section 8(b)(7) although the picketing in fact constitutes an attempt by the union to force the employer to bargain with it." (Brief 17). This is what happened in the case at bar—Higdon "voluntarily recognized (respondent) union and has entered into a labor agreement with it." Yet the Board contends the union's picketing in this case is in violation of Section 8(b)(7)(C) solely because of its erroneous ruling that Section 8(f) contracts may be unilaterally abrogated by an employer.

As the Board itself pointed out in the *Bay Counties* case, recognitional picketing occurs only where the union attempts to gain *"initial"* recognition. It is contrary to fact to say that the respondent union in this case engaged in recognitional picketing, when the record is uncontroverted that it had been engaged in collective bargaining with the employer for eight years, and had entered into labor agreements with the employer during that time. (App. 19, 23).

Petitioner attempts to distinguish these cases on the basis that this rule applies only where the employer recognized "an uncertified union representing a majority of the employees". (Brief 16-17). However, nowhere in the language of those cases does such a distinction appear—and the very language

of the Board itself, shows that the concept of "recognitional picketing" applies only where the union seeks to obtain *"initial"* recognition. Thus, as the Court of Appeals for the Columbia Circuit pointed out in *Dallas Building and Construction Trades Council v. NLRB* (D.C. Cir. 1968), 396 F. 2d 677, at 683: ". . . The Board correctly points out that Section 8(b)(7)(A) is aimed only at a labor organization's picketing to gain recognition for the first time, not picketing designed to retain its representative status."

C. **The Board's concern for unwilling employees is misplaced. The statutory safeguards provided by Section 8(f) for an employer and its employees to decline union representation were fully available, but were not used by the employer or its employees in the case at bar.**

The record is silent and states absolutely no reason to explain why, if the employees were unwilling to be represented by respondent union and did not want to accept the benefits of the collective bargaining agreement, they failed to file a petition for an election, which is one of the safeguards provided them under Section 8(f). It certainly is not unreasonable to infer that they were satisfied with being represented by the union and having the benefits of the collective bargaining agreement herein. But in any event, this affords no justification for the Board to amend Section 8(f) to insert a requirement that an 8(f) contract is valid only if the union achieves majority status, where the Act does not so state and ample safeguards for workers' rights to decline union representation are available and were not exercised.

Therefore, the two decisions of this Court principally relied upon by petitioner afford petitioner no support. As we pointed out above, *Connell Construction Company, Inc. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616, did not involve an 8(f) agreement, and this Court recognized in *Connell* that Sec-

tion 8(f) agreements are valid because of the safeguards preserving workers' rights to decline union representation, which were not exercised in the case at bar.

Petitioner then attempts to rely on *Linden Lumber Division v. National Labor Relations Board*, 419 U.S. 301, and incorrectly cites it for the proposition that "the Act places the burden on the union to establish its majority". (Brief 32). This is a clear distortion of *Linden*, because *Linden* did *not* involve a Section 8(f) agreement and this quotation does not apply to an 8(f) pre-hire agreement. Petitioner ignores the fact that if an employer does not want to continue to comply with a collective bargaining agreement he entered into, Section 8(f) of the Act does place the burden on him, or on his dissatisfied employees, to file a petition for an election. Therefore, *Linden* offers petitioner no support. This Court did not, in *Linden*, sanction an employer's flagrant violation of a contract it voluntarily entered into, after eight years of a collective bargaining relationship with the union as was done in the case at bar, where the employer and its employees had the reasonable alternative of petitioning for an election if they believed that the union did not represent the majority of the employees.

Petitioner is in error when it states that "here, as in *Linden Lumber*, there was no evidence of unfair practices by the employer". (Brief 34). On the contrary, in its brief in the Court of Appeals, petitioner admitted that the Company had committed a "putative unfair labor practice" (page 17). There is strong evidence of unfair labor practices on the part of the employer here—the Record is uncontroverted as to the employer's "subterfuge and chicanery" and its forming of a dummy corporation in order to undermine the union's area wage standards, which the employer had agreed to, and to "get around the contract" it had solemnly entered into.

These unfair labor practices in this case were so flagrant as to bring down the strong disapproval of both the District Judge

who denied the Board's petition for an injunction, and the Administrative Law Judge who condemned them as "subterfuge and chicanery".

Perhaps more shocking is the petitioner's position that not only can an employer repudiate its contract if it says the union does not represent a majority, but that it is free to commit unfair labor practices because of the same.

As the Court of Appeals pointed out in squarely demolishing this contention, in *Local No. 150, supra*:

> "We agree that section 8(f) does not wholly obviate the union's need ultimately to achieve majority status, but we disagree with the Board's conclusion that the employer can commit unfair labor practices before the union become a majority. To state the history and purpose of section 8(f) is both to reject the contention and to decide the case, because *we cannot conceive of such an exercise in futility on the part of Congress as to validate a contract with a union having minority status, but to permit its abrogation because of the union's minority status.* The Board's interpretation . . . would frustrate Congress' purpose of approving pre-hire agreements in the construction industry, for it would render them voidable at will. If the union, or the employer, can neither bring nor maintain unfair labor practice complaints, pre-hire agreements would be virtually unenforceable. We are certain that this was not the purpose of Congress.
>
> "Moreover, under the Board's interpretation, an employer, unhappy with a pre-hire agreement, can avoid it by discouraging union membership through flagrant unfair labor practices, thereby insuring that the union never attains a majority. This case illustrates that danger." 480 F. at p. 1190. (Our emphasis).

Petitioner misstates the position of the Court of Appeals when it states that "Under the Court's view an employer would be bound by a pre-hire agreement not only in cases where his employees desire no union but also even in cases where most of his employees are members of another union". (Brief 29-30).

In the first place, if most of an employer's employees are members of another union, he would not sign a pre-hire agreement with a different union, because, as petitioner itself recognizes, one of the principal purposes of a Section 8(f) agreement is for an employer "to have available a supply of skilled craftsmen ready for quick referral". (Brief 21). If an employer already has a supply of skilled craftsmen available who are members of another union, he would not need to sign a pre hire agreement with a different union.

Further, as the Court of Appeals emphasized in its decision, if an employer's employees desire no union, or belong to another union, the employees or the employer can petition for an election *at any time*, as Section 8(f) provides. Under the expedited election proceedings of the Board, the matter then would be determined in a couple of weeks, rather than in years as would be the case under the Board's position that an 8(f) agreement can only be validated in a subsequent unfair labor practice proceeding.

Further, the procedure set out in the Act and recited by the Court below, is one which follows the law, rather than disregards it, and would not encourage parties to unilaterally abrogate collective bargaining agreements, which is the effect of the Board's position herein.

Similarly, the false alarm petitioner conjures up, that the Court of Appeals' position poses a danger that unions will be able to coerce employees' support through such tactics as protracted picketing, deliberately disregards the wording of the Act and misstates the position of the Court of Appeals.

If an employer believes that union picketing is coercive, he can petition for an election the very day that the picketing starts. Under the Board's procedure for expedited election, the matter can be determined in less than the thirty days that the petitioner would allow a union to picket, under its attempt to redraft Section 8(f).

The weakness of the petitioner's contentions herein is shown by the fact that petitioner not only seeks to rewrite the Act, but finds it necessary to rewrite its own decision in its brief in this Court in order to defend it. Thus, in this Court, the Board contends that under the Board's decision an 8(f) agreement is valid in some circumstances, although it can be unilaterally abrogated by an employer, but the Board's decision itself holds "that Section 8(f) only protects from illegality *the preliminary contractual steps* of a pre-hire agreement . . ." (Pet. App. 18a) (Our emphasis).

The Board misstates the law when it states that its "decisions under Section 8(f) reveal a consistent rationale" and then uses such consistency as an argument in favor of the courts abandoning their role in interpreting the statute in favor of the Board's "familiarity with the statute". (Brief 25, 34).

The fact is, that as Judge Winter pointed out in his opinion in *Local No. 150, supra*, reversing the Board, a prior decision of the Board is directly contrary to its decision in the case at bar and in *R. J. Smith Company, supra*:

> "Finally, prior Board precedent supports our interpretation of § 8(f). Oilfield Maintenance Co., Inc., 142 N.L.R.B. 1384 (1963), held that an employer was bound to a pre-hire agreement and that therefore its failure to observe its provisions constituted an unfair labor practice. The opinion explained: 'Although . . . the majority status of the (union) prior to the commission of the unfair labor

practices has not been demonstrated . . ., the (union's) . . . contract would still be valid under Section 8(f).' *Id.* at 1387. The opinion 'specifically note(d) in this regard the final proviso to Section 8(f) . . .' *Id.* at 1387 n. 10. We hold therefore that an employer, who has entered into a validly executed § 8(f) pre-hire agreement may, after a reasonable period, seek a representation election to challenge an enduring minority union, but until he does and prevails, he should be held to the same standard of conduct in regard to unfair labor practices as an employer who has entered into a collective bargaining agreement with a union certified to have majority status." (480 F. 2d 1190-1191).

It is uncontroverted that the Act is designed to encourage good faith bargaining and promote industrial peace. These objectives would be destroyed by the Board's position that an employer, which engaged in conduct characterized by a District Judge as "corporate gymnastics" and by an Administrative Law Judge as "subterfuge and chicanery", should be immunized from its unfair labor practices and can with impunity repudiate a valid 8(f) labor agreement entered into with a union with whom it had engaged in collective bargaining for eight years.

CONCLUSION

The judgment of the Court of Appeals should be affirmed on Judge Danaher's excellent opinion, which follows unanimous decisions of the U.S. Court of Appeal for the Third and District of Columbia Circuits.

Respectfully submitted,

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FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. *Amicus curiae* American Federation of Labor and Congress of Industrial Organizations errs in contending (Am. Br. 10-13) that the Board's decision in this case is contrary to *Retail Clerks International Association* v. *Lion Dry Goods, Inc.*, 369 U.S. 17.

In *Lion Dry Goods* this Court held that a federal district court had jurisdiction under Section 301(a) of the Labor Management Relations Act, 61 Stat. 156, 29 U.S.C. 185(a), over a suit brought by a union against an employer to enforce the terms of a strike settlement agreement even though the union in the agreement disclaimed any entitlement to recognition as the exclusive bargaining representative of the employees in the unit.

The Court rejected the contention that "[s]uits for violation of contracts between an employer and a labor organization representing employees," as used in Section 301(a), should be confined to "agreements concerning wages, hours, and conditions of employment concluded in direct negotiations between employers and unions entitled to recognition as exclusive representatives of employees" (369 U.S. at 25), and noted that such a contention would, among other things, support the "improbable congressional intent that the federal courts [would] be closed to [Section 8(f)] contracts" (*id.* at 27).

As the Court made clear, the decision in *Lion Dry Goods* concerned primarily the *jurisdiction* of federal courts under Section 301(a) to consider contracts between employers and labor organizations, and not the validity or enforceability of particular contracts or contract terms.[1] While the Court indicated its view that the strike settlement agreement in that case would be enforceable (369 U.S. at 27), it did not consider or purport to decide whether all labor contracts—either Section 8(f) agreements or otherwise—would be enforceable, or under what circumstances they would be enforceable.

The proposition suggested by *Lion Dry Goods* that federal courts under Section 301(a) have jurisdiction over Section 8(f) agreements, and may even enforce such agreements in certain circumstances, is entirely consistent with the Board's position in this and related cases. As we pointed out in our opening brief (pp. 26-27), an employer is bound by a Section 8(f) agreement if the union in fact represents a majority of the employees in the appropriate unit, and in those circumstances the union

[1]Thus the Court stated (369 U.S. at 25, n. 6), "[the employer] agree[s] that the only issue is jurisdictional."

could bring suit under Section 301(a) for the enforcement of the agreement. Similarly, if the employer does not dispute the union's majority or agrees to be bound by the agreement, federal courts under Section 301(a) could determine disputes over the meaning of contract terms.

But *Lion Dry Goods* does not suggest that Section 301(a) renders enforceable contracts the enforcement of which would otherwise contravene the policies of the National Labor Relations Act, which is the very issue presented in this case. For example, *Lion Dry Goods* did not overrule *International Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 366 U.S. 731, where the Court reaffirmed the established principle that a collective bargaining agreement between a minority union and an employer was an unfair labor practice, which tended "to completely frustrate employee realization of the premise of the Act" (*id.* at 738-739), and was not "valid and enforceable [even] as to those employees who consented to it * * *" (*id.* at 737).[2] Indeed, the Court in *Lion Dry Goods* expressly stated that its decision "does not touch upon whether minority unions may demand

[2]The Court in *Lion Dry Goods* stated, by way of illustrating contracts cognizable under Section 301(a), that "'Members only' contracts have long been recognized." 369 U.S. at 29. The fact that the Court emphasized that "members only" contracts—contracts that apply only to union members when no exclusive bargaining agent has been selected—have been recognized as consistent with the policies of the Act reflects, we submit, its view that federal courts may, under Section 301(a), enforce labor contracts so long as they are otherwise consistent with the policies of the Act. Indeed, this Court and the courts of appeals have subsequently made that clear by not enforcing contracts where enforcement would conflict with Board decisions under the Act. See *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 272; *Smith Steel Workers* v. *A.O. Smith Corp.*, 420 F. 2d 1, 7 (C.A. 7); *Retail Clerks International Association* v. *Montgomery Ward & Co.*, 316 F. 2d 754 (C.A. 7).

that employers enter into particular kinds of contracts or the circumstances under which employers may accord recognition to unions as exclusive bargaining agents." 369 U.S. at 28-29. The issue in the present case is whether the terms and policies of the Act permit or prohibit the enforcement of a Section 8(f) agreement against an employer and his employees when the union does not represent a majority, and that issue was not considered or decided by *Lion Dry Goods*.[3]

2. Respondent and *amicus curiae* strain to find inconsistencies between the Board's decision in this case and the reasoning they infer from—but not the holdings of—other Board decisions. For example, *amicus* argues that there is an inconsistency with *Local 86, Painters (Carpet Control, Inc.)*, 216 NLRB 1127 (Am. Br. 52-54), because the Board in that case, in holding that a union violated Section 8(b)(7) by picketing to secure a new Section 8(f) agreement, did not expressly disagree with its dissenting member's view that if the picketing was merely to enforce an existing Section 8(f) agreement, the picketing would not have been unlawful. *Amicus* therefore argues that the Board's alleged failure to explain the supposed "logical dilemma" warrants a remand to the Board (Am. Br. 49, 52). As discussed in our opening brief, the Board's decisions in this area reflect a consistent rationale and the supposed logical dilemmas are illusory.

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[3]We assume that the AFL-CIO would not contend that Section 301 and *Lion Dry Goods* require a federal court to enforce a Section 8(f) agreement after a union has been ousted by a Board-held election, since it appears to agree that such an event terminates the enforceability of such agreements (Am. Br. 38, n. 43). That being so, it is difficult to see the relevance of *Lion Dry Goods* to the issue here, which the AFL-CIO also appears to agree (despite stylistic criticisms) is *when* the agreement becomes unenforceable (*id.* at 37-40, and nn. 43, 44).

As stated in our opening brief, *Disney Roofing*[4] and *Sullivan Electric*[5] (discussed at Res. Br. 10; Am. Br. 46-52) reflect the Board's rule that a union does not violate Section 8(b)(7) when it pickets to enforce an existing agreement after the employer has recognized the union as the majority representative of his employees; neither case stands for the proposition that the employer's execution of a Section 8(f) agreement, without more, constitutes "initial recognition" of the union as the majority representative of his employees. In *Disney Roofing* there was no question concerning the union's majority status. Disney's employees were all members of the union when it originally entered into a collective bargaining agreement with Disney, and the union was still the majority representative when it picketed to obtain a renewal of that contract.[6] Similarly, in *Sullivan Electric*, the Board found as a fact that the employer "had recognized and extended bargaining rights to the [union] long before the disputed picketing commenced * * *." 146 NLRB at 1087; *id.* at 1093. In *Local 86, Painters*, as noted, the Board held that the union *did* violate Section 8(b)(7) when it picketed to obtain a Section 8(f) contract

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[4]*Bay Counties District Council of Carpenters (Disney Roofing and Material Company)*, 154 NLRB 1598.

[5]*Building and Construction Trades Council of Santa Barbara County (Sullivan Electric Company)*, 146 NLRB 1086.

[6]The Board stated: "In our view the pre-1962 relationship between [the union] and Disney establishes that Disney recognized [the union] as the representative of its employees. At the time the picketing began, virtually every one of Disney's employees was either a member of a union affiliated with [the] District Council or had recently terminated such membership as a result of Disney's violations of Section 8(a)(2), so there is no question of the majority status of [the union]. And no legitimate reason is suggested to support Disney's decision to cease recognizing [the union] as the representative of its employees in 1962." 154 NLRB at 1605-1606.

with the employer, and the Board's failure to comment on a hypothetical situation which it did not find to have existed reflects, if anything, prudent administrative (and judicial) practice, rather than a "logical dilemma" requiring further explication.

Oilfield Maintenance Co., Inc., 142 NLRB 1384, also relied on by respondent and *amicus* (Res. Br. 15-16; Am. Br. 42-44), involved an unusual factual situation not presented here, and has been expressly limited by the Board to its particular circumstances. In that case a predecessor employer had Section 9(a) collective bargaining agreements with five unions. The successor employer refused to honor the agreements and entered into a new agreement with another union which it sought to justify as a Section 8(f) agreement. The Board held that the successor employer could not use Section 8(f) to abrogate existing valid contracts. But since the Board found that the successor employer had sucessfully rebutted the presumption of continued majority status of the unions after their contracts had expired, it declined to order the successor employer to bargain with four of those unions for new contracts. However, the Board found that the predecessor employer had entered into a Section 8(f) agreement with the fifth union that was still in force and ordered the successor employer to honor that agreement until it expired or the union was unseated by an election.

The focus of the *Oilfield Maintenance* decision was on a successor employers' attempt to use Section 8(f) to repudiate existing agreements entered into by its predecessor and the Board has declined to extend the decision to the kind of Section 8(f) agreements involved in this case and *R.J. Smith Construction Co.*, 191 NLRB 693, enforcement denied *sub nom. Local 150, Operating Engineers* v. *National Labor Relations Board*, 480 F. 2d

1186 (C.A. D.C.). Thus in *Ruttmann Construction Co.*, 191 NLRB 701, n. 5, decided the same day as *R.J. Smith*, the Board held that an employer had not refused to bargain in violation of Section 8(a)(5) when it declined to apply a Section 8(f) agreement with one union to a new project and instead entered into another Section 8(f) agreement with another union;[1] it distinguished *Oilfield Maintenance* on the ground that "*Oilfield* primarily concerned the right of a successor-employer to disavow contracts made by a predecessor with five different unions and substitute the terms of a contract it had with another union." That situation is not presented here.

3. Respondent and *amicus* argue generally that respondent's picketing at the Grace and Barmet jobsites was not in violation of Section 8(b)(7) because (1) the Board's decisions under that Section only proscribe picketing for "initial recognition," (2) Higdon Construction had initially recognized respondent by signing a Section 8(f) agreement for the Glenmore project, and (3) the Board found that Higdon Contracting was the *alter ego* of Higdon Construction. That chain of reasoning is erroneous.

In concluding that the Union, in picketing to enforce the agreement at the Grace and Barmet projects, was seeking initial recognition, the Board explained (Pet. App. 20a; footnote omitted) that "the duty of Higdon Construction and its *alter ego*, Higdon Contracting, to honor the Employer's collective-bargaining agreement with [the Union] is limited by the nature of 8(f) agreements." For the reasons set forth in our opening brief (pp. 19-35), the Board properly concluded that a "'prehire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship';" "8(f) contracts do not carry,

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[1] Quoting from *Ruttmann Construction Co.*, *supra*, 191 NLRB at 702.

even with union-security provisions, a presumption of majority status until such time as employees for particular projects have been hired" (Pet. App. 19a).[7]

Accordingly, even Higdon Construction would have been free to repudiate the contract at the Glenmore project before the Union had acquired majority status there, and picketing at that jobsite by respondent before it obtained majority support would have been subject to Section 8(b)(7). But even if respondent had acquired majority status at the Glenmore jobsite,[8] this would not have required Higdon Construction to apply that contract to the Grace an I Barmet projects absent an independent showing of respondent's majority at those projects. Higdon Contracting is in no different position.[10] Hence,

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[7]See also *Dee Cee Floor Covering, Inc.*, 232 NLRB No. 72, decided September 27, 1977, slip op. 4 ("the mere fact that the Union might indeed have represented a majority of the employees at Respondent Dee Cee's previous jobsites is of no consequence inasmuch as the Union must demonstrate its majority at each new jobsite in order to invoke the provisions of Section 8(a)(5) of the Act").

[8]The Board, however, found that, even at that project, respondent never represented a majority of Higdon's employees (Pet. App. 15a).

[10]Contrary to respondent's attempt to depict Higdon's action as a subterfuge designed to avoid contract obligations, it is not a violation of the National Labor Relations Act for a company having a union agreement, in order to compete in the non-union construction market, to form a subsidiary to employ non-union labor to work non-union jobs. See Penfield, *The Double-Breasted Operation in the Construction Industry*, 27 CCH Labor Law J. 89 (1976); *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers*, 425 U.S. 800, decision following remand, *sub nom. Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 231 NLRB No. 13, 95 LRRM 1510.

As Gerald Higdon, president of both companies, explained (App. 31):

> * * * I have a lot of competition that is * * * non-Union and I have to compete with em * * *; otherwise I'd be competing with Union people and * * * I am just not big enough to compete with most of the Union people in this area.
>
> When it comes to larger jobs, I am not there. I have to compete with the smaller contractors. So, I formed the second company * * *.

Higdon pointed out that, while he did not pay union scale and benefits on non-union projects, he attempted to assure his employees full-time employment: "Yes, I pay 'em less than Union scale, but I imagine they make more in a year's time than a Union member" (Tr. 69). He also explained that, in order to provide full-time employment for his men, he used them not only to do "ironwork" but to do various other types of construction work, as "that's the only way I can keep 'em busy the year round" (Tr. 70).

respondent's effort to force it to apply the contract to the new projects may properly be viewed as an effort to obtain initial recognition there, within the meaning of Section 8(b)(7)(C) of the Act.

For these reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should

be reversed, and the case should be remanded to that court with directions to enforce the Board's order.

Respectfully submitted.

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October Term, 1977

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL-CIO, *et al.*, *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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INTRODUCTION AND SUMMARY OF ARGUMENT

Consideration of the issues in this case will be clarified by identifying at the outset the points of agreement and disagreement between the Board and ourselves with respect to the operation of § 8(f) of the National Labor Relations Act.[1] The following is common ground between the parties:

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[1] The National Labor Relations Act, 49 Stat. 449, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 141 *et seq.*, will be referred to herein as the "NLRA". Section 8(f) was added by § 705 of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 545) (hereafter the "LMRDA" or "1959 Act").

Section 8(f) is addressed to the relationship between employers, unions and employees in the building and construction industry. It authorizes any employer in that industry and labor organization which has members employed in that industry to enter into an agreement covering employees who are engaged (or will upon their employment be engaged) in that industry. Section 8(f) declares such an agreement to be lawful even though the union's majority status has not been established prior to the making of the agreement.

Where the relationship between the parties is based upon a § 8(f) agreement, any employee, the employer, the signatory union or an outside union may at any time file a petition pursuant to § 9(c) to determine whether the union does represent a majority of the employees. If the union wins the election, it is certified and the agreement remains in effect. If the union loses the election, it loses the right to represent the employees and the agreement is automatically abrogated.[2]

By virtue of § 8(f), and consistent with state law, the parties may include in their agreement a union-shop clause requiring employees to become members of the union after seven days following the beginning of employment or the effective date of the agreement, whichever is later.[3] Where

[2] *Modine Mfg. Co.* v. *Grand Lodge, IAM*, 216 F.2d 326 (C.A. 6) (where another union is certified); *Retail Clerks Int'l Ass'n* v. *Montgomery Ward & Co.*, 316 F.2d 754 (C.A. 7) (where the union is decertified but no union is certified).

[3] Section 705(b) of the 1959 Act provides that such union security provisions will not be lawful if the applicable State law forbids, thereby preserving § 14(b) of the NLRA with respect to such agreements.

such a clause is agreed upon, any employee may, at any time, file a petition pursuant to § 9(e) for a secret ballot election to determine whether the employees wish to terminate the union membership requirement.[4]

Where the employer and the union have entered into a § 8(f) agreement which includes a lawful union-shop provision, and that provision has been enforced, the employer violates § 8(a)(5) of the Act if he repudiates the agreement. *NLRB* v. *Irvin*, 475 F.2d 1265, 1270-1271 (C.A. 3), enforcing in relevant part, 194 NLRB 52; see Bd. Br. 26-27.

The disagreement between the Board and ourselves concerns the rights of the parties where the employer refuses to adhere to a valid § 8(f) agreement which does not contain a union security clause (or where such a clause, although agreed upon, has not been enforced), and the employer repudiates the agreement without an election having been held under § 9(c). In the Board's view, such an employer repudiation does not violate § 8(a)(5). This was its decision in *R. J. Smith Construction Co.*, 191 NLRB 693, *reversed sub nom., Local No. 150, International Union of Op. Eng.* v. *NLRB*, 480 F.2d 1186 (C.A.D.C.). Moreover, according to the Board's opinion in this case, it follows from its interpretation of § 8(f) in *Smith*, that if a union, in order to compel compliance with a § 8(f) agreement, pickets an employer without filing a petition for election, the union violates § 8(b)(7)(C) (see Pet. 20a-21a).[5]

There is a partial point of agreement even as to this disagreement. For the Board asserts that the determinative

[4] Employers and labor organizations cannot petition for an election under § 9(e).

[5] Because it disagreed with the Board's § 8(f) premise, the Court of Appeals did not, in reversing the Board herein, pass on the

"issue in [this] case [is] whether Section 8(f) itself establishes that a union signatory to a pre-hire agreement shall be deemed by operation of law to be the recognized bargaining representative of all employees subsequently hired until the agreement expires or the union is ousted by an employer-initiated [or employee-initiated] Board election" (Bd. Br. 18-19).

We agree that if that issue is decided against the Board (as it was by the Court of Appeals), the decision below must be affirmed. The converse, however, is not true. For, even if a § 8(f) agreement does not give the signatory union the status of exclusive bargaining representative, the Board's finding of a violation depends upon its interpretation of § 8(b)(7)(C), which is very much in issue in this case. Moreover, the Board's basic assumption that if an employer does not violate § 8(a)(5) by repudiating a § (8)(f) agreement with a minority union, that agreement is "noneffective" is plainly wrong, because it overlooks § 301(a) of the LMRA.

I. We show in point I of the brief that the essential premise of the Board's holding in this case that § 8(f) "contracts are voidable by either party if a union [after recognition] * * * obtains a majority status" and therefore "noneffective" (Pet. 20a) is contrary to this Court's interpretation of § 301(a) in *Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17. In that case this Court squarely held that the right to sue under § 301(a) to enforce contracts between employers and labor organizations is not limited to labor organizations

validity of the step by which the Board expanded its *Smith* decision (which granted the employer a privilege to repudiate) into a doctrine making the picketing to protest that repudiation an unfair labor practice on the part of the union.

which represent a majority. In reaching that conclusion the Court not only took note of § 8(f) but drew therefrom significant support for its holding (369 U.S. at 27 and 29). Neither the Board nor the respondent take notice of *Lion Dry Goods* and we therefore conclude point I by suggesting that the appropriate course is to vacate the judgment below and remand the case to the Board for reconsideration in light of the holding—based on § 301(a)—that the agreement herein was not, as the Board supposed, "noneffective" when the employer refused to honor it.

II. In point II we indulge the Board's tacit assumption that § 301(a) does not bear on this case, and meet the Board on its own ground. We show that the basic point of § 8(f) is that the union authority to enter into exclusive bargaining contracts in the building and construction industry does not depend upon the existence of the support of a majority of the employees, let alone a showing of such majority support; the section and its legislative history demonstrate that the union shall have such authority even under circumstances where it is plain that the union does not have majority support, for example, where the agreement is entered into before any employees have been hired. That authority is subject to defeasance in a representation election which may be directed at any time on petition of the employees, the employer, the union party to the § 8(f) agreement or an outside union. To that critical extent, § 8(f) alters "the basic principles of the Act, which impose an affirmative obligation on unions to achieve and demonstrate majority support" (Bd. Br. 31) as a precondition for authority to bargain about employee wages and other working conditions. The Board's current interpretation of § 8(f) which is deduced from those "basic principles" rather than

from the special rules which Congress established for the building and construction industry is doomed to failure.

To lay bare the Board's errors we compare and contrast the normal rules concerning the establishment and termination of collective bargaining relationships with the scheme established by § 8(f). That comparison establishes that the office of the body of § 8(f) is to overturn the normal rule that an employer may not grant "exclusive representative status to a minority union" (*Garment Workers* v. *Labor Board*, 366 U.S. 731, 737). The authoritative Senate Report makes it plain that the purpose of § 8(f) is to permit employers and unions in the building and construction industry to enter into "exclusive bargaining contracts" even though the union does not have the support of a majority (S. Rep. No. 187, 86th Cong., 1st Sess., p. 28). Our comparison establishes further that the office of the final proviso to that section is to draw a major countervailing distinction between § 8(f) agreements and other lawful exclusive bargaining contracts by lifting the Board's contract bar rules as to § 8(f) agreements only, thereby allowing any party to petition for an election to determine the union's majority status at any time. We demonstrate that the Board's rule, which permits employers to repudiate § 8(f) agreements during their term, adds nothing to the protections afforded employee free choice by § 8(f) but rather imposes the employer's choice on those employees without an election.

Next, we rebut the Board's attempt to find significance in the fact that the language of §§ 8(a)(5) and 9(a) was left undisturbed in 1959. This fact is a total irrelevance, since Congress also left undisturbed §§ 8(a)(1), (2) and (3), whose operation was admittedly altered in the building

and construction industry by § 8(f). We then examine the legislative history in detail, and demonstrate that the Board is in error in its reliance on Congress' rejection of an administration proposal which would, among other things, have permitted certification of a union on the basis of an agreement between the employer and the union. We show that this proposal was subject to severe limitations, and was for that reason viewed as being "more restrictive and unworkable" than the proposal which became § 8(f).

We next show that the Court of Appeals was clearly right in refusing to attribute to Congress "such an exercise in futility * * * as to validate a contract with a union having a minority status, but to permit its abrogation because of the union's minority status" (480 F.2d at 1190). We note particularly that under the Board's interpretation, the right to repudiate under § 8(f) is a two-edged sword, which can also be exercised by a *minority union* to strike or threaten to strike (but not picket) during the term of an agreement in order to obtain more favorable working conditions.

We next address and rebut the Board's objections to the Court of Appeals' reasoning emphasizing that those objections rest on a policy premise which Congress expressly rejected in enacting § 8(f).

We conclude by discussing two prior decisions, one of which is mistakenly relied on by the Board and the other ignored by it, although it is a precedent squarely contrary to its decision herein. The Board asserts that *Linden Lumber Division* v. *NLRB*, 419 U.S. 301, supports the principles on which its decision herein is based. But *Linden* arose in the normal situation of a union seeking exclusive recognition on the basis of its initial recognition of majority support, and not the situation dealt with by § 8(f). Moreover,

if the *Linden Lumber* analogy were valid, it would cut *against* the Board's position, because the Board itself has held that an employer who has agreed to have the union's majority status determined by a means other than an election, cannot, if he is dissatisfied with the result, insist upon a Board election as a condition for recognition. See *Linden Lumber*, 190 NLRB 718, 721. The reason for this exception as the Board explained in its brief in this Court in *Linden Lumber* is "to encourage the parties to adhere to and follow agreements * * *." The Board's interpretation of § 8(f) is wholly at odds with that purpose. It is also at odds with the principle found decisive by this Court in *Linden Lumber* itself, namely, that "the election process ha[s] acknowledged superiority in ascertaining whether a union has majority support" (*id.* at 304). Congress followed this principle by choosing in the § 8(f) proviso the method by which a union's majority status can be challenged during the term of a § 8(f) agreement.

The prior precedent which is directly in point is *Oilfield Maintenance*, 142 NLRB 1384, where the Board expressly held that an employer was bound by a § 8(f) agreement even though the union had not demonstrated majority support, and directed the employer to bargain with that union. That *Oilfield Maintenance* is a precedent squarely contrary to the interpretation of § 8(f) which the Board adopted in *Smith* was pointed out in that case by the dissenting Board members and by the Court of Appeals when it reversed; nevertheless, no explanation of this inconsistency has ever been offered by the Board.

III. In point III we demonstrate that even if the Board's interpretation of § 8(f) is accepted, there would be no violation of § 8(b)(7)(C). We show first that it does not follow from the Board's premise (that an employer does not violate § 8(f)(5) by repudiating a § 8(f) contract) that a union violates § 8(b)(7)(C) by picketing to compel the employer to adhere to his § 8(a) agreement.

In the remainder of our argument on this issue we show that the result reached by the Board in this case cannot be reconciled wit' its holding in the *Sullivan Electric* case, 146 NLRB 1086, that § 8(b)(7) was intended only to proscribe picketing to compel "an employer's initial acceptance of the union as the bargaining representative of his employees". The statement in the Board's decision that picketing to enforce a § 8(f) agreement which an employer has repudiated is "for initial recognition purposes" is nonsensical: If a § 8(f) agreement affords recognition, picketing to enforce that agreement cannot be for "*initial* recognition"; if a § 8(f) agreement does not afford recognition, picketing to enforce it cannot be for recognition either. The effort of Board counsel to distinguish the *Sullivan Electric* case on the ground that there the union was picketing for adherence to an agreement reached between an employer and a union that had gained majority support has no basis in the Board's decisions, and therefore cannot be accepted by this Court as a basis for affirming the Board herein. See, *e.g.*, *NLRB* v. *Food Store Employees*, 417 U.S. 1, 9. Moreover, a decision by the Board issued less than three months after that herein reveals that the agency itself would not accept the distinction of *Sullivan Electric* which counsel have advanced on its behalf. In *Local 86, Painters*, 216 NLRB 1127, a majority of the Board held that the union which was party to a § 8(f) agreement had violated § 8(b)(7)(C) by picketing the employer "not, of course, to protest a supposed breach of their agreement as

our dissenting colleague believes, but to force company acceptance of new contract terms" (*id.*). If the Board had understood its own precedents as standing for the proposition that *Sullivan Electric* does not apply to a union which is recognized only pursuant to a § 8(f) agreement, it would have been irrelevant whether or not the union was protesting the employer's breach. Thus, *Painters* establishes not only that the Board's decision herein had no antecedent in *Sullivan Electric*, but also that it has no progeny. Under these circumstances this Court may well conclude that a remand to "afford[] the Board an opportunity to clarify [its] inconsistencies" (*Food Store Employees*, 417 U.S. at 9) is a nicety which the agency's performance does not merit.

ARGUMENT

I. THE BOARD'S CENTRAL DETERMINATION THAT A § 8(f) AGREEMENT IS "VOIDABLE BY EITHER PARTY" IS CONTRARY TO RETAIL CLERKS V. LION DRY GOODS, 369 U.S. 17.

The Board's holding in this case rests on the proposition that § 8(f) "contracts are voidable by either party if a union never thereafter obtains a majority status. In these circumstances, we conclude that the picketing by Respondent to enforce a *noneffective* 8(f) contract was for initial recognitional purposes and therefore was proscribed by Section 8(b)(7)(C) of the Act" (Pet. 20a-21a, emphasis added). The view that such a contract is "voidable" when the union does not have a majority, and when one party has voided it is "noneffective", rests on the Board's decision in *Smith* that an employer who repudiates an agreement under such circumstances does not violate § 8(a)(5) of the Act.

But whatever may be the merits of the *Smith* decision, see point II *infra*, the Board was clearly wrong in declaring in this case that a § 8(f) agreement is "voidable" when the union does not have majority support. For, § 8(a)(5) and its related provisions, §§ 8(b)(3) and 8(d), are not alone in providing a sanction for the enforcement of contracts between employers and unions. There is, of course, § 301(a) of the Labor-Management Relations Act of 1947[6] which provides as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * * may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

And this Court has squarely held in *Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17, that the right to sue under § 301(a) to enforce contracts between employers and labor organizations is not limited to labor organizations which represent a majority. In reaching that conclusion the Court not only took note of § 8(f), but drew therefrom significant support for its holding.

Section 8(f) is relied on at two points of the *Lion Dry Goods* analysis. In rejecting the defendant's narrow interpretation of "contracts", the Court reasoned:

> "*Third.* A 1959 enactment, § 8(f), explicitly contemplates contracts that would not fit respondents' concept of 'collective bargaining agreements.' It authorizes contracting with unions that represent persons not yet even hired by the employer. Such a contract might cover only hiring procedures and not wages, hours, and

[6] 61 Stat. 156, U.S.C. § 185(a).

conditions of employment. *Nothing supports the improbable congressional intent that the federal courts be closed to such contracts.*" (369 U.S. at 27, footnote omitted; emphasis added.)

Additionally, in holding that the right to sue under § 301 (a) is not limited to unions which represent a majority, the Court said:

> "'Members only' contracts have long been recognized. See, *e. g., Consolidated Edison Co.* v. *Labor Board,* 305 U.S. 197. Had Congress thought that there was any merit in limiting federal jurisdiction to suits on contracts with exclusive bargaining agents, we might have expected Congress explicitly so to provide, for example, by enacting that § 301(a) should be read with § 9(a). Compare § 8(a)(3), § 8(a)(5), § 8(b)(3), § 8(b)(4), § 8(d). Moreover, § 8(f), the 1959 amendment considered *supra*, p. 27, contemplates contracting with unions that would not represent a majority. Lastly, if the federal courts' jurisdiction under § 301(a) required a preliminary determination of the representative status of the labor organization involved, potential conflict with the National Labor Relations Board would be increased, cf. *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U.S. 18, *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F.2d 183, and litigation would be much hindered." (*Id.* at 29.)

In sum, it is clear from *Lion Dry Goods* that by virtue of § 301(a), a § 8(f) agreement is enforceable even if the union does not have majority support; therefore, it is not "voidable by either party" and does not become "noneffective" when, as here, one party purports to repudiate it. Thus, § 301(a), which the Board apparently overlooked in deciding this case (and which has not been mentioned by either

of the parties),[7] totally destroys the premise on which the Board found that the respondent Union violated § 8(b)(7)(C).

Accordingly, the Board's order cannot be enforced, see *e.g., SEC* v. *Chenery Corp.*, 318 U.S. 80, 332 U.S. 194. Thus, while we believe (and urge in points II and III hereof) that on consideration of the issues which have been briefed by the parties the judgment of the Court of Appeals denying enforcement of the Board's order should be affirmed, it appears to us the more appropriate course is to vacate the judgment below and remand the case to the Board for reconsideration in light of the holding—based on § 301(a)—that the agreement herein was not "noneffective" when the employer refused to honor it. It is the Board's responsibility in the first instance to construe § 8(b)(7)(C) with this error of law "laid bare" (*South Prairie Const.* v. *Operating Engineers*, 425 U.S. 800, 805-806, quoting *FPC* v. *Idaho Power*, 344 U.S. 17, 20).[8]

II. THE BOARD'S INTERPRETATION OF § 8(f) IS ERRONEOUS.

A. The Board's argument begins from the proposition that "[a] fundamental tenet of the National Labor Relations Act, reflected in many of its provisions, is that employees shall have the right 'to bargain collectively through

[7] The only reference to judicial enforceability of § 8(a) agreements in the Board's brief is the following sentence: "There are natural disincentives to prevent businessmen, who must deal on a continuing basis with labor organizations, from freely repudiating their agreements, even though such agreements may not be enforceable in court" (Bd. Br. 28, n. 21).

[8] A determination by the Board on reconsideration that there was no violation of § 8(b)(7)(C) would render wholly academic

representatives of their own choosing.' Section 7" (Bd. Br. 12-13). But the other fundamental tenets of the Act concerning the initiation of bargaining relationships and their termination are not identified. Thus, it is not surprising that by page 19 of that brief a reformulation of the same point has elevated this one tenet among several to "the Act's major premise." It is therefore necessary, we believe, to begin by identifying with more precision the normal rules regarding the duty to bargain.

First, the Act permits employers to voluntarily recognize as the exclusive representative of his employees a union that demonstrates majority support among a representative employee complement in an appropriate bargaining unit, but employers may not "grant exclusive representative status to a minority union" (*Garment Workers* v. *Labor Board*, 366 U.S. 731, 737).

Second, where a collective agreement is in force, "the Board will not entertain a representation petition seeking a new determination of the employees' bargaining representative during the middle period of a valid outstanding collective bargaining agreement of reasonable duration" (*Hexton Furniture Co.*, 111 NLRB 342, 344).

Third, when the exceptions to the contract bar rule apply to permit the holding of an election during the term of a

for purposes of this case the other issue—whether an employer who repudiates the agreement when the union has not maintained majority support thereby violates § 8(a)(5). In that connection we note that in the *Smith* case (where that issue first arose), the Board stated on brief to the Court of Appeals: "• • • the circumstances presented by the instant case are somewhat unusual and rarely encountered in the industry" (Brief for the National Labor Relations Board in *Local No. 150, International Union of Operating Engineers* v. *N.L.R.B.* (C.A.D.C.), No. 71-1689, at p. 23).

collective agreement, if the employees repudiate the incumbent, the agreement is automatically abrogated. See p. 2, n. 2 *supra*, citing *Modine Mfg. Co.*, 216 F.2d 326 (C.A. 6), and *Montgomery Ward & Co.*, 316 F.2d 754 (C.A. 7).

Finally, so long as a collective agreement is in force, the Act also "prescribes the duty to maintain [its] mandatory terms without unilateral modification for [its] duration" (*Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. 147, 186).

These rules reflect the *several* competing fundamental substantive and procedural interests at stake and the appropriate weight to be accorded to each during the evolution of the bargaining relationship and depending on the particular circumstances.

Thus, the *Garment Workers* rule reflects "the guarantee of employee freedom of choice and majority rule." (366 U.S. at 736.) The contract bar rule rests on "the statutory objective of encouraging and protecting industrial stability" (*Pacific Coast Ass'n of Pulp & Paper Mfrs.*, 121 NLRB 990, 994). And, the *Montgomery Ward* rule is derived from the proposition that "Any right to recognition as bargaining agent, which the plaintiff unions secured by virtue of their contracts, ceased and became inoperative on decertification" (316 F.2d at 757). Finally, § 8(d)'s prohibition of mid-term unilateral contract changes states "an important theme of • • • the 1947 revision of the Act • • • which was to stabilize collective bargaining agreements." (*Pittsburgh Glass*, 404 U.S. at 186.)

We now examine the scheme by which § 8(f) accommodates these interests in the construction industry:

> "(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer

engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, * * * *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 150(c) or 159(c) of this title."

Plainly, the office of the body of § 8(f) is to overturn the rule that an employer may not grant "exclusive representative status to a minority union" (*Garment Workers*, 366 U.S. at 737). Indeed, this is acknowledged at Bd. Br. 13, and 20, n. 12. Section 8(f) is identical to the provision reported out by the Senate Labor Committee (and adopted by the Senate, then rejected in favor of a competing proposal in the House, but included in the conference bill which was signed into law).[9] Thus, S. Rep. No. 187, 86th Cong., 1st Sess., 28[10] is authoritative and it confirms that the problem sought to be solved was that:

> "In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as

[9] We detail the legislative history at pp. __-__ *infra*.

[10] 1 NLRB Legislative History of the Labor Management Reporting and Disclosure Act of 1959 (GPO 1959) p. 424 (hereafter "Leg. Hist.").

> 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated. The practice of signing such agreements for future employment is not entirely consistent with Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired."

This "inconsistency" was resolved by making lawful in the construction industry both "exclusive bargaining contracts" between an employer and a construction employees union that is not a company union and which has not "established its majority status," and, as is generally true, exclusive bargaining contracts between an employer and a union which has established its majority.

It is equally plain that the office of the proviso is to draw a major countervailing distinction between § 8(f) exclusive bargaining contracts and other lawful exclusive bargaining contracts by lifting the Board's contract bar rules as to § 8(f) agreements only. There are several lessons to be drawn from the proviso:

First, the proviso confirms our understanding that the body of § 8(f) is designed to equate § 8(f) agreements and other exclusive bargaining contracts. If the Congress had not understood that except as the 1959 amendments provided otherwise § 8(f) agreements were to have the same legal ramifications as other exclusive bargaining contracts, it would have been unnecessary to include the proviso. For, only exclusive bargaining contracts have ever been considered a bar to a Board election.[11]

[11] See *Appalachian Shale Products*, 121 NLRB 1160, 1164.

Second, there is not a word in § 8(f) or its history to suggest that Congress intended to draw distinctions between § 8(f) agreements and other exclusive bargaining contracts other than the one stated in the proviso. The Board would dismiss the "language of the final proviso" as "plainly permissive" (Bd. Br. 30). But, despite the well-settled rule that an employer may not repudiate or even modify an exclusive bargaining contract so far as it settles mandatory subjects of bargaining during its term, there is no such permission for an employer to repudiate or unilaterally modify a § 8(f) agreement during its term. The fair inference, we submit, is that no such permission was intended.

Third, this inference is strengthened, we believe, by the Act's preference for the settlement of disputes as to majority through Board conducted elections rather than through litigation ~~in~~ unfair labor practice cases. "In terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored." (*Linden Lumber Division* v. *NLRB*, 419 U.S. 301, 307.) The proviso to § 8(f) continues this "policy of encouraging secret elections" to resolve disputes as to majority. The Board's present rule that the employer may repudiate a § 8(f) agreement and force a union that claims majority status to "litigate" that "fact" in "an unfair labor practice proceeding under Section 8(a)(5) or 8(b)(7)" (Bd. Br. 27) cannot, of course, be squared with that policy.

Finally, it is manifest that the inclusion in § 8(f) of the proviso demonstrates that the 1959 Congress was conscious of, and attentive to, the importance of protecting the interest in employee freedom of choice. While that choice

is given a lesser weight than normally at the recognition stage, its protection through assured continuous access to the Board's *election processes* is thereafter given greater weight than normally. Contrary to the Board, there is nothing "anomalous" in the Congressional judgment, apparent from the words of the statute, not to change the normal § 8(d) rules as well in order to permit "an employer [to] test" the union's majority status "in the context of litigating a Section 8(a)(5) charge" (Bd. Br. 26). That additional change in the normally applicable rules would have run counter to the preference for Board elections to settle disputes as to majority. Moreover, without advancing the protection of employee freedom of choice, such a change would have undermined the competing interests in industrial peace and the stability of contracts. Permitting petitions for Board elections during the term of § 8(f) agreements allows for a peaceful and orderly determination of the employees' desires. Permitting employer repudiation of a § 8(f) agreement on the other hand destroys, in situations in which the covered employees *do* support the union, the stability during the terms of an agreement that both §§ 8(d) and (f) are designed to assure. Congress was certainly entitled to take this large difference into account. And, what § 8(f) does and does not say shows that Congress did so by sanctioning election petitions and by continuing the prohibition on employer repudiation of exclusive bargaining contracts.

B. The Board argues that it is significant that "Congress in 1959 did not, in § 8(f) or elsewhere, modify § 8(a)(5) * * *" and that section's "reference to * * * Section 9(a)'s definition" of an "exclusive bargaining representative" as the representative "selected by the majority of the em-

ployees" (Bd. Br. 23). It is true that § 8(f) did not, *in terms*, modify § 8(a)(5), but this is a circumstance without any significance whatsoever in interpreting the scope of § 8(f). For, § 8(f) likewise did not, *in terms*, modify §§ 8(a)(1), (2), (3), or §§ 8(b)(1)(A) and (2), and yet it is acknowledged that the operation of those provisions was changed by the 1959 law when the parties entered into an agreement sanctioned by § 8(f).[12] Rather, the drafting technique employed was to negate the law making it unlawful to conclude an exclusive bargaining contract only with a majority union by the blanket phrase that henceforth in the construction industry it "shall not be an unfair labor practice" to do so. Accordingly, "the language of § 8(f) and its relationship to other provisions of the Act" (Bd. Br. 23) is entirely consistent with a continuing duty of the employer to adhere to the pre-hire agreement unless and until the union has been decertified.

The Board argues further:

> "The legislative history of Section 8(f) confirms that Congress did not intend its authorization of prehire agreements in the construction industry to confer automatic representative status on the union or to obviate the union's obligation to acquire majority support. Congress rejected a proposal that would have permitted the Board to certify a union signing a pre-hire agreement as the employees' representative without an election or other proof of majority support merely upon a showing of a history of bargaining between the union and the employer. Instead, as noted, Congress provided that the representative status of the union could be challenged at any time." (Bd. Br. 24-25, footnote omitted.)

[12] The Board's argument also does not take account of the fact that "Congress in 1959 did not, in § 8(f) or elsewhere, modify" § 8(d), which forbids unilateral mid-term modifications and terminations of agreements, see 480 F.2d at 1180, n. 8, and p. 15, *supra*.

This misstates the substance of the competing provisions considered by the Congress.

The language of what was ultimately enacted as § 8(f) first appeared as § 604 of the proposed Labor-Management Reporting and Disclosure Act of 1958, as reported by the Senate Committee on Labor and Public Welfare (S. 3974, 85th Cong., 2d Sess.). This provision differed significantly from the treatment of the problem in Sen. Kennedy's original bill (S. 3738), which had provided that on a petition by an employer "asserting that [the] employer recognizes the labor organization as the representative defined in § 9(a) and has entered into a collective bargaining agreement with such labor organization," the Board would be authorized to certify the union as the exclusive representative of all the employees of the employer "in such unit as the Board may find is normally represented by the labor organization in the building and construction industry." However, by virtue of a "*Provided further*," clause, the Board was not to be so authorized where there was no collective bargaining history between the employer and the union "prior to the current agreement," or where it is alleged by or "in behalf of" any employee "and the Board finds that a substantial number of employees presently employed in the bargaining unit assert" that the union does not represent the majority of the employees.[13]

This proposal was criticized by Prof. Archibald Cox in his

[13] Section 1 of S.3738 provided in full:

"(a) section 9 (c) (1) of the National Labor Relations Act,

testimony during the Committee Hearings on S. 3738 and related bills. Prof. Cox agreed with the desirability of "legislation dealing with some of the peculiar problems of the construction industry".[14] But in his view the Kennedy bill "suffer[ed] * * * from one very serious fault. The draftsman seems to have overlooked the impact of his

as amended, is amended by inserting after the semicolon at the end of paragraph (B) the word 'or' and the following:

'(C) by an employer primarily engaged in the building and construction industry and a labor organization acting in behalf of employees engaged (or who, upon their employment, will be engaged) in the building and construction industry, asserting that such employer recognizes such labor organization as the representative defined in section 9 (a) and has entered into a collective bargaining agreement with such labor organization;'

(b) Before the period at the end of section 9 (c) (1) insert a colon and the following: '*Provided*, That the Board may, without prior thereto having conducted an election by secret ballot, certify a labor organization referred to in clause (C) of this paragraph as the exclusive representative of all the employees of an employer referred to in said clause (C) in such unit as the Board may find is normally represented by the labor organization for the purposes of collective bargaining with respect to pay, wages, hours, and other conditions of employment: *Provided further*, That the preceding proviso shall not apply where there is no history of a collective bargaining relationship between the petitioning employer and labor organization prior to the current agreement or an employee or group of employees of any individual or labor organization acting in their behalf allege, and the Board finds, that a substantial number of employees presently employed by the employer in the bargaining unit assert that the labor organization is not a representative as defined in section 9 (a)'."

[14] Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 85th Cong., 2nd Sess. (Union Financial and Administrative Practices and Procedures) (hereafter "1958 Senate Hearings"), p. 386.

language upon jurisdictional disputes in the construction industry * * *."[15] He explained that if the Board certifies a union on the basis of the unit as defined in the agreement between the employer and the union, that definition would be binding on other unions for purposes of § 8(b)(4)(C) (which bars strikes against certification) and would severely undermine the authority of the voluntary machinery for settling jurisdictional disputes which the unions and the employers in the building and construction industry had established.[16]

The Committee thereafter reported a bill (S. 3974), contained a provision (§ 604) respecting pre-hire agreements in the building and construction industry, which, but for a single phrase is identical to the present § 8(f), rather than the original proposal put forward by Senator Kennedy.[17] However, the Welfare and Pension Plans Disclosure Act which was ultimately adopted, 72 Stat. 997, contained no amendments to the Taft-Hartley Act, and so the problem remained unresolved.

Section 604 of S. 3974 of the 85th Congress was introduced in the 86th Congress *in haec verba* as § 603 of the Kennedy-

[15] *Id.*

[16] 1958 Senate Hearings, pp. 386-388.

[17] S. Rep. No. 187, 86th Cong., 1st Sess. 28, 1 Leg. Hist. 424 explained:

"The only significant change made in the language of this section of S. 1555 as compared to the similar section in S. 3974 would restrict the right to enter into agreements otherwise authorized by the section, to labor organizations of which building and construction employees are members. The purpose of this requirement was to make it clear that criminal or 'paper unions' should not avail themselves of the privilege of entering into such agreements."

Ervin bill (S.505).[18] And § 506 of the Eisenhower Administration's labor package, known as the Goldwater-Dirksen bill (S. 748) was identical to S. 3738 of the prior Congress (set forth at pp. 21-22, n. 13, *supra*), which authorized the Board to certify the union, but subject to the limitations of the "*Provided further*" clause (described at p. 21 *supra*.[19] The Kennedy-Ervin version prevailed in Committee with but the single modification just described, and was reported as § 602 of S. 1555.

S. 1555 as passed by the Senate retained its original § 602 intact, renumbered as § 702.[20] Moreover, the Kennedy-Ervin proposal was adopted in its entirety in the bill reported to the floor by the House Committee on Education and Labor (§ 702(a) of H.R. 8342),[21] and the paragraph from the Senate Report (quoted at pp. 16-17 *supra*), was adopted *in haec verba* in the House Report.[22]

The Landrum-Griffin substitute, on the other hand, was identical to the Administration's S. 748 (providing for Board certification subject to the important restrictions previously described, as its sponsors' analysis noted).[23] The

[18] I Leg. Hist. 76-78.

[19] *Id.* at 147-148.

[20] I Leg. Hist. 579-580.

[21] I Leg. Hist. 750-751.

[22] See H. Rep. No. 741 86th Cong. 1st Sess., p. 19, I Leg. Hist. 777.

[23] "Section 702 (building and construction industry): This section is a substitute for section 702 of the committee bill. It would permit the National Labor Relations Board to certify a union as the representative of employees in the construction industry without first conducting an election—if the union and the employer petition for such certification, and if there is a history of collective bargaining between the union and the employer. A substantial number of the affected employees may challenge the majority status of the union and cause an election to be conducted." (II Leg. Hist. 1522.)

analysis by the supporters of the Committee bill (Congressmen Thompson and Udall) of the Landrum-Griffin bill objected to the latter's § 702 for five reasons:[24]

> "(1) The Landrum bill permits certification and prehire contracts only where the employer and unions have a history of bargaining together. This is a cynical attempt by certain employer associations to discriminate against new businesses and contractors seeking to expand into new areas. The Landrum bill tends toward restraints of trade and monopoly."[25]
>
> "(2) The Landrum bill would unreasonably interfere with the freedom of employees to choose their own bargaining representatives."[26]

[24] II Leg. Hist. 1578.

[25] This point was illustrated by two examples.

[26] Because this is the only portion of the Thompson-Udall analysis which touches on the argument at Bd. Br. 24, we set forth their explanation in full:

> "The Landrum bill provides that the NLRB may certify a labor union as the representative of employees in the construction industry whenever the employer and the union file a petition stating that they have signed a contract fixing terms and conditions of employment. Under the usual Board rules, this certification would bar the employees from any election to choose their own representative for at least a year. The committee bill authorizes the pre-hire contracts but preserves freedom of choice in situations where elections can be held by a proviso which expressly states that the pre-hire agreement shall not be a bar to a petition for an election. Obviously this is a fairer, more democratic solution."

It is to be noted that this analysis does not suggest that the present § 8(f) is superior in that it permits the employer to repudiate a pre-hire agreement. Rather, it refers only to the lifting of the contract bar rule as the favored means "for preserv[ing] freedom of choice." Moreover in drawing the comparison the analysis fails to mention—and therefore misstated the impact of the Administration proposal on employee free choice—that a certification could be blocked at the outset by the objection of "a substantial number of employees."

"(3) There is no need for the amendment.

Section 702 of the committee bill does not open the door to sweetheart contracts or dealings with paper locals dominated by racketeers. Prehire contracts are negotiated only with unions which can supply the skilled mechanics and laborers required for construction work. The disclosures before the McClellan committee related to employees already on the payroll who were forced into racketeering unions not of their own choosing." [27]

"(4) The Landrum bill would weaken, if not destroy, voluntary machinery for the settlement of jurisdictional disputes which has operated successfully for 10 years with the support of both employers and unions." [28]

"(5) The Landrum bill is technically defective." [29]

Nevertheless the House adopted the Landrum-Griffin substitute. As part of the compromise reached in the Conference Committee, however, the Senate version was chosen, and became what is now § 8(f). The Conference Report is entirely unilluminating as to the reasons for the choice,[30] but Senator Kennedy, the leader of the Senate Conferees,

[27] This was a response to the charge that § 702 of the Committee bill opened the door to sweetheart contracts with paper unions.

[28] This is the same point that had been made by Prof. Cox in the 1958 Senate hearings (see pp. 22-23 *supra*). The Thompson-Udall analysis explained this problem in considerable length.

[29] The analysis pointed out that the:

"draftsmen of the [Landrum-Griffin] bill attempted to solve this problem by empowering the NLRB to issue certifications but only after the employer and contractor had signed an unlawful agreement. If this bill were approved, the law would say this: 'You can't lawfully make the contract without the NLRB certification, but you can't have the certification until you have made the contract.'"

[30] House Conf. Rep. No. 1147, 86th Cong., 1st Sess., 41-42, I Leg. Hist. 945-946.

and Cong. Udall, one of the House Conferees, each stated in explaining the Report to his colleagues:

> "The conference report incorporates the essential provisions of the Elliott bill authorizing labor unions and contractors in the construction industry to negotiate pre-hire agreements. *The more restrictive and unworkable provisions of Landrum-Griffin were rejected.*" [31]

In sum, the Third Circuit was correct when it said in *Irvin:* "Nothing in either the text or the legislative history of § 8(f) suggests that it was intended to leave construction industry employers free to repudiate contracts at will." 475 F.2d at 1271.

C. A further, decisive objection to the Board's interpretation of § 8(f) is that it attributes to a provision which was designed to meet the special practical problems in the building and construction industry an effect which is utterly impractical.[32] As the Court of Appeals observed in the *R. J. Smith* case:

> "To state the history and purpose of § 8(f) is both to reject the [Board's] contention and to decide the case,

[31] II Leg. Hist. 1432, 1722 (emphasis added).

[32] For the purposes of the discussion in this point hereof, we indulge the Board's assumption that § 8(f) agreements are "voidable by either party" if the union has not obtained a majority. But see our demonstration in point I, pp. 10-13, that such agreements, at the least, are enforceable in court under § 301(a). This assuredly ameliorates the practical difficulties caused by the Board's misinterpretation of § 8(f), and provides a more substantial disincentive to repudiation than those advanced at Bd. Br. 28. Nevertheless, § 301 does not justify the Board in misconstruing § 8(f) to deny to the aggrieved party the "concurrent, overlapping" Labor Board remedy (cf. *NLRB* v. *Strong*, 393 U.S. 357, 360) and to prohibit the union from picketing to enforce its contractual rights.

because *we cannot conceive of such an exercise in futility on the part of Congress as to validate a contract with a union having minority status, but to permit its abrogation because of the union's minority status.* The Board's interpretation, as exemplified by its application in this case, would frustrate Congress' purpose of approving pre-hire agreements in the construction industry, for it would render them voidable at will. If the union, or the employer, can neither bring nor maintain unfair labor practice complaints, pre-hire agreements would be virtually unenforceable. We are certain that this was not the purpose of Congress.

"Moreover, under the Board's interpretation, an employer, unhappy with a pre-hire agreement, can avoid it by discouraging union membership through flagrant unfair labor practices, thereby insuring that the union never attains a majority. This case illustrates that danger. Credible testimony established that the company never intended to comply with its labor agreements; it refused to negotiate with the union; it gave selective pay increases; it fired its only two union employees; and it refused to honor the contracts' hiring hall and union security clauses. Again, we perceive the Congressional purpose to be to the contrary." (480 F.2d at 1190, emphasis added.)

The Court of Appeals' understanding that the Board's decision would render the § 8(f) agreement "voidable at will" is confirmed by the Board's opinion in this case which, as we observed at the outset, describes the Board's "decision in *R. J. Smith* and its progeny" as holding "that such contracts are voidable by either party if a union never thereafter obtains majority status" (Pet. 20a). And a consideration of the practical consequences of that holding will show that the Court of Appeals was also correct in

refusing to attribute "such an exercise of futility" to Congress.

As *Smith* and this case exemplify, an employer who believes that he has received all the benefit of a § 8(f) agreement, and who considers it economically more advantageous to repudiate the agreement may, under the Board's view, repudiate it with impunity if the union has not demonstrated majority support. The employees are thereby deprived of the benefits of the agreement and will be able to work for the employer, if at all, only on his own unilaterally established terms; these will never be more generous that the terms of the agreement. Since, by virtue of § 8(f) itself, the employer may lawfully adhere to the agreement regardless of whether the union has obtained the support of a majority of the employees, his repudiation thereof cannot be explained as a response to the felt compulsion of the law rather than his own self-interest. And since the statute gives both the employer and the employees the right to petition for an election at any time, the possibility that the employer is repudiating the contract instead of filing a petition in order to protect the rights of the *employees* is also theoretical at best. The records in *Smith* and in this case (see p. 32, n. 36 and p. 34, text and note at n. 39, *infra*) exemplify the real life situations which the Board's interpretation of § 8(f) fosters, as the Court of Appeals recognized.

Moreover, the employer's knowledge that he can at his pleasure escape the agreement in its entirety, gives him a powerful weapon to undermine the agreement by resisting enforcement of particular terms with the threat to repudiate the whole.[33]

[33] Most agreements in this industry provide for periodic payments to health and welfare pension funds in addition to the

Additionally, the *Smith* rule makes the contract "voidable by *either* party if a union never thereafter attains majority status" (Pet. 20a, emphasis added). This means that a minority union, may repudiate a § 8(f) agreement. The AFL-CIO believes that this too is undesirable, although it would undoubtedly benefit some unions and some employees. Under *Smith*, a union which is dissatisfied with the terms of the agreement (or which believes that the employer is not adhering thereto, and is unwilling to follow the grievance procedure) could pull its members off the job. Even where the union members are only a minority of the work force the employer will often have sufficient need for their services that such action by the union (or the threat thereof) would effectively require him to comply with the union's wishes.[34] It is paradoxical, though compelled by the theory of *Smith*, that this weapon would be available only to a minority union and not to a majority union.

The Board's decisions do not address the practical consequences of its interpretation of § 8(f). But its brief in

hourly wage. Where the wage itself is higher than that on non-union jobs, an employer's threat to reject the agreement in full if the union insists on the payment to the fringe benefit funds, will put the union in an impossible dilemma. Again, a union that presses a grievance (cf. Article VI of the Agreement herein, A.63) for any violation of the agreement will risk an employer's response rejecting the entire agreement.

[34] The Board has held in *Local 86 Brotherhood of Painters, etc. (Carpet Control, Inc.)*, 216 NLRB 1127, discussed at pp. 52-54, *infra*, that a union violates § 8(b)(7)(C) if, in addition to repudiating the agreement it also pickets the employer for a new § 8(f) agreement. While we assume the result reached in that case is correct, it would not protect the employer in the situation described in the text, for § 8(b)(7) is directed only at "picketing" and not at a concerted refusal to work.

this Court takes pains to minimize the adverse effects of the *Smith* rule, asserting that it provides "reasonable assurance that such agreements will have the effect and serve the purposes which Congress intended in sanctioning them" (Bd. Br. 28). We submit that an Act of Congress should be construed, if possible, in a manner that provides more than just "reasonable assurance" that its purpose will be fulfilled. In any event, the Board's modest claim on examination comes down only to the proposition that there are some situations where § 8(f) will accomplish its purpose, *despite* the Board's decision in *Smith*. In those situations where the Board's rule makes a difference, that purpose is frustrated.

The Board says: "Employers and unions in the construction industry are able to enter into pre-hire agreements that will provide the employer with the needed certainty in determining his costs and with a ready supply of skilled labor" (Bd. Br. 28). This accurately states a major practical objective which §8 (f) is designed to achieve,[35] but the Board's interpretation defeats that objective by enabling a minority union to withdraw during the agreement. Moreover, § 8(f) was also designed to benefit the employees who provide the "skilled labor", which the Board's interpretation enables employers to exploit by entering into agreements which they intend to honor only as long as it serves their own purpose. And while we do not agree that § 8(b)(7)(C) in any way regulates the union's right to picket to protest the employer's breach (see point III, *infra*), the Board's acknowledgement that this provision "provides the union with a reasonable period of time (up to thirty days) to picket to enforce the agreement ***"

[35] See S. Rep. No. 187, 86th Cong. 1st Sess. p. 28, 1 Leg. Hist. 424.

(Bd. Br. 29), invites the question whether it is desirable (and Congress intended) that unions be compelled to employ economic weapons to enforce § 8(f) agreements and that they be deprived of the legal remedies available to enforce other collective bargaining contracts.

The other situations discussed at Bd. Br. 28 are largely beside the point, because the same result obtains under both the Court of Appeals' or the Board's view of § 8(f). Under both interpretations a union which represents a majority will be able to enforce the agreement. So too, the outcome of this case would not affect those employers, if any, who are reluctant to repudiate a pre-hire agreement for fear of generating ill will (Bd. Br. 28); by hypothesis the existence or nonexistence of legal obligations is irrelevant to their behavior. The Board adds: "In most cases, of course, as Congress assumed, employers in the construction industry will not unilaterally abrogate pre-hire agreements." (Bd. Br. 28, n. 21.[36] We agree that Congress so assumed, but it is far

[36] The one situation on which the Board relies as supposedly exemplifying enlightened self-interest, namely, the action of the employer in this case, is singularly unsuited for the purpose. See p. 34, *infra*.

The Board says: "Higdon complied fully with the pre-hire agreement on the project in connection with which he signed it" (Bd. Br. 28, n. 21). Insofar as this seeks to convey the impression that Higdon did not breach his agreement, it is bootless, given Higdon's own admission (A. 33, quoted at p. 34, n. 39 *infra*.). Moreover, the record is plain that the agreement between the union and Higdon Construction Company was not limited to a particular project; rather, it covered all employees "employed and having a job classification of or performing labor as a practical journeyman, ironworker or apprentice" within the territorial limits of the respondent local (see Articles I and III of the Agreement, A. 48 and 49). The Acceptance of Agreement, signed by Gerald J. Higdon on behalf of Higdon Construction Company, unqualifiedly declares that the undersigned "hereby accepts and approves said Agreement and becomes one of the Parties thereto." The Acceptance also states:

> "Said Agreement being in effect from April 1, 1973, covering the jurisdictional area which extends half-way to the nearest outside Local Union of Bridge, Structural and Ornamental Iron Workers." (A. 45).

more plausible that it did so in the expectation that those agreements would be enforced by the Board and the courts. The legislative history of § 8(f) provides no evidence that Congress qualified in any way the judgment which it had made in 1947, when it determined that the "natural disincentives" are insufficient "to prevent businessmen * * * from freely repudiating their agreements" (Bd. Br. 28, n. 21), and therefore reinforced these disincentives with the sanctions of §§ 8(d) and 301(a).

Moreover, the Board makes an entirely inadequate response to the Court of Appeals' demonstration that the *Smith* rule invites unfair labor practices. All that the Board says (and even this comes in a later section of that brief) is that employer unfair labor practices are deterred by §§ 8(a)(1) and 10(j) (Bd. Br. 33).[37] But § 10(j) is rarely invoked by the Board, is cumbersome,[38] and requires court

[37] The argument that the potential for employer abuse is no greater than in *Linden Lumber Division* v. *NLRB*, 419 U.S. 301, is incorrect (even assuming the case is otherwise analogous), because under *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, as reaffirmed in *Linden*, an employer loses his *Linden* privilege to insist on an election if he commits unfair labor practices which are "likely to destroy the union's majority and seriously impede the election," see 395 U.S. at 600, quoted at 419 U.S. at 303-304.

[38] Under the Board's internal procedures, a petition for an injunction under § 10(j) must be authorized by the Board, on a request from the General Counsel; even before the petition for injunction is filed, many months usually pass.

intervention; this proposed palliative is plainly inadequate. The Board's brief does not even attempt to meet the Court of Appeals' point with respect to employer conduct like that in the *Smith* case itself; nor can it, given the fact that the Board had dismissed the complaint in *Smith* and ultimately gave the union any relief at all only in obedience to the Court of Appeals' mandate, *R. J. Smith Construction Co.*, 208 NLRB 615. And in the present case the General Counsel dismissed the §§ 8(a)(1), (3) and (5) charges, apparently under the compulsion of *Smith*, although the employer not only refused to deal with the union but, almost certainly deliberately selected non-union employees to work for the alter ego "Higdon Contracting Co."[39] In short, contrary to Bd. Br. 33-34 "the basis for the court of appeals' concern is [*all too*] clear."

D. The Board's objections to the result reached by the Court are likewise without merit. Most fundamentally, they start from a policy premise which Congress disavowed. The Board says: "The court of appeals' decision * * * would significantly abridge the Act's basic principle that employees shall be represented for collective bargaining purposes only by representatives whom a majority of the employees have freely selected" (Bd. Br. 29). Far from being a valid criticism of the Court of Appeals' opinion, this ob-

[39] Mr. Higdon acknowledges that he deliberately created Higdon Contracting Company (which the Board properly found to be the alter ego of Higdon Construction Company (the signatory to the § 8(f) agreement, see Pet. 20a, n. 7) "in order to, uh, get around the contract, as you put it, uh, to be able to bid with my competition, yes" (A. 33, quoted in the ALJ's decision Pet. 35a, n. 8). It was after having thus repudiated the agreement that the employer hired personnel who would be willing to work at wages sufficiently low to enable him "to bid with [his] competition". He could achieve this objective only by selecting for hire employees who were not members of the union, thereby violating § 8(a)(3), see, *e.g.*, *Phelps Dodge* v. *Labor Board*, 313 U.S. 177. And if one were to entertain the purely theoretical notion that Higdon, in the guise of Higdon Contracting Company, chose employees without regard to their union non-membership, he must have ascertained their willingness to work at the wage that he offered rather than that provided under his agreement with the union. Thus the Board's example is, at best, that of an employer who by his breach has destroyed the union majority, and then relies on the loss of majority to defend the breach. This bootstrapping is approved by the Board as permissible under *Smith*.

servation shows that that Court properly understood that the very function of § 8(f) is to "significantly abridge" these "principles" in this industry, as the Board's brief elsewhere acknowledges (Bd. Br. 19-22; see also pp. 16-20, *supra*). The Court of Appeals' decision goes no farther in doing so than did Congress.

While the Court of Appeals' decision does indeed "mean that a minority union could compel an employer to comply with a § 8(b) agreement, whether through a § 8(a)(5) bargaining order or unlimited picketing, for the entire term of the agreement *or* until the Board completes an election initiated by the employer's petition" (Bd. Br. 29; emphasis supplied), this creates no hardship on the employer, because under the last proviso to § 8(f), he may petition for an election at any time. Under the Board's view, however, he may escape his agreement without following the means prescribed by Congress, *and without giving his employees the opportunity to express their choice in a Board election*. That proviso is also Congress' answer (and that of the Court of Appeals) in the situation where the employees desire no union or some other union, for, like the employer, the employees and the other union can petition for an election which terminates the agreement if the incumbent union

loses. Since unions are normally anxious to preserve their agreements with employers, and to increase their membership, the Board is wrong when it says that "the court's decision would significantly lessen the incentives of a union with a pre-hire agreement to acquire the support of a majority of the employees subsequently hired" (Bd. Br. 30).[40]

Nor does it advance the Board's case to invoke the epithet "'top-down' organizing" (Bd. Br. 30) to describe the effect of the Court of Appeals' decision herein.[41] While that phrase connotes bringing employees under a collective agreement by a decision of the employer and the union rather than one by the employees, that is just what § 8(f) contemplates; again, the Court's decision goes no farther. For it is the voluntary § 8(f) agreement rather than "the coercion inherent in protracted picketing" which

[40] However, if the union wishes to retain the option of repudiating the agreement in order to secure more favorable terms by threat of a work stoppage, see p. 30 *supra*, the *Board's* decision, by granting that option, actually gives the union an incentive *not* to acquire the support of the majority.

[41] By use of this phrase the Board invokes without citing *Connell Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616. But the issues presented in that case, which arose outside "the context of a collective bargaining relationship" (*id.* at 627), are far afield from those concerning the force and effect of § 8(f) agreements presented here. Indeed, the one passage in *Connell* concerning § 8(f) favors our position:

> "The only special consideration given them in organizational campaigns in § 8(f), which allows "pre-hire" agreements in the construction industry, but only under careful safeguards preserving *workers'* rights to decline union representation." (*Id.* at 632, emphasis added.)

For, as we have shown, the Board's position here detracts from the statutory "safeguards preserving workers' rights", namely, the proviso to § 8(f) guaranteeing resolution of disputes concerning majority through a Board election.

results in the organization of the employees. Indeed, even under the Board's view, where a § 8(f) agreement includes a union security clause, § 8(a)(5) governs and § 8(b)(7)(C) does not (Bd. Br. 27). Thus, the Board's decision, unlike that of the Court of Appeals, "would significantly [increase] the incentives of a union with a pre-hire agreement to acquire the support of a majority of the employees subsequently hired" (cf. Bd. Br. 30) by obtaining a union security clause in that agreement. Contrast the fate of the signatory unions under the Board's decisions and in *Smith* with that of the union in *Irvin*, p. 3, *supra*.[42]

Bd. Br. 30-31 criticizes the Court of Appeals because its decision would have a result which is contrary to *the Board's* theory of what § 8(f) means in a passage that culminates in the charge that the decision would "in effect * * * accord the union the very presumption of representative status that Congress specifically declined to confer in enacting Section 8(f)" (Bd. Br. 31). But, since as we have shown (particularly at pp. 21-27 *supra*, replying to Bd. Br. 23), Congress did *not* "specifically decline[] to confer" representative status on unions which enter into § 8(f) agreements, the Court of Appeals' decision merely effectuates the actual Congressional intent.

In summing up the Board says "Under the court's decision a pre-hire agreement becomes unenforceable after a

[42] The Board's opinion here attempts to justify the conclusion reached by noting that in *Irvin* despite the union's majority status at the projects which were still under way, the "Board nevertheless dismissed the complaint therein with respect to projects not yet begun at the time the employer terminated the union contract" (Pet. 19a-20a). That misstates the basis on which the Board dismissed a portion of the *Irvin* complaint. That partial dismissal did not rest on the Board's construction of § 8(f), or on a finding with respect to the union's lack of a majority at the other projects.

Board election, initiated by the employer's petition, determines that the union lacks majority support." (Bd. Br. 31.)[43] Under the *Board's* decision, however, "a pre-hire agreement becomes unenforceable" *without* a Board election to determine that the union lacks majority support, at the instance of whichever party wishes to repudiate the agreement. Thus, a less ambiguous and more complete description of the "significant difference[s] between the court's and the Board's " position than that presented at Bd. Br. 31,[44] is as follows:

Under the court's decision the "*when*" (the agreement becomes unenforceable) is *after* the employees have made their views known in the Board election contemplated by the proviso to §8(f); under the Board's decision, the "*when*" is *before* that election, if either the employer or the union is dissatisfied with the agreement and wishes to repudiate it. Under the court's decision the "determining event" (if that means the event which determines whether the union has majority support) is the Board-conducted elec-

Rather, it was based on a limitation contained in the § 8(f) agreement in that case, which provided that it would be converted into a "project-only" agreement if the union entered into a project-only agreement with any competitor of the employer. The union in fact did enter into such other agreement and the Board's *Irvin* opinion stated: "Therefore, at the termination of each project on which [the Employer] was then working, it was free to terminate its relationship with District 50" (194 NLRB 52).

[43] This is correct as far as it goes, but it omits the important fact that under the Court's decision (and the last proviso to § 8(f)), an election can also be initiated by a petition filed by the employees or by an outside union (and of course by the incumbent union).

[44] The Board says: "The significant difference between the court's position and the Board's relates to *when* the agreement becomes unenforceable and who has the burden of triggering the determining event" (Bd. Br. 31, emphasis in original). The obscurity of

tion, and the "burden of triggering" that event is on the party which seeks to change the *status quo;* under the Board's decision the majority is to be determined, in an unfair labor practice proceeding, and the "burden of triggering" that event is on the party which wishes to preserve the agreement.[45] Further, if the Board's phrase "determining event" connotes the event which in fact terminates the actual enforcement of the agreement, there is also a significant difference: Under the court's decision the "determining event" in this sense also is the Board-conducted election "triggered" by the party seeking to alter the *status quo;* but under the Board's decision the "determining event" is the unilateral, self-interested decision of the repudiating party, which is empowered to shift to the other party the burden of establishing that the repudiation was unlawful.

Moreover, as we have stressed, it is irrelevant whether the Board's position is, or the court's is not, consistent with what the Board terms "the basic principles of the Act, which impose an affirmative obligation on unions to achieve

this sentence is achieved largely by the general phrase "relates to"; the brief does not come straight out and say what the "significant difference" *is*, or what the "significant differences" *are*. Moreover, with respect to the Board's position, the phrase "determining event" has different meanings depending on whether it refers to the event which determines that the union has lost its majority, or refers to the event which terminates the agreement; further, the term "burder" is a misnomer as applied to the position of the repudiating party under the Board's decision.

[45] The party which claims that the agreement remains valid may, under the Board's decision, file a refusal-to-bargain charge, under § 8(a)(5) or § 8(b)(3), as the case may be. Additionally, under the Board's interpretation of § 8(b)(7)(C) herein, the repudiating party may file a § 8(b)(7) charge against the union (if it has picketed to enforce the agreement), which may then defend by proving a majority. See Bd. Br. 27.

and demonstrate majority support" (Bd. Br. 31), for § 8(f) rejects those principles in this industry. What *does* matter is that 1) *only* the court's position is consistent with the specific policy of § 8(f), which imposes no "obligation on unions to achieve majority support" to achieve recognition, but instead grants the union representative that is party to an agreement authority unless and until it is revoked in a Board election which may be had at any time; and 2) *only* the court's position is consistent with another, no less basic principle of the Act—embodied in the continuing duty to bargain under §§ 8(a)(5) and 8(d) as well as § 301(a)—which § 8(f) leaves undisturbed: *pacta sunt servanda.*

E. The Board's brief asserts that "[t]his Court, in analogous circumstances, has recently reaffirmed the principles which also support the Board's decisions under Section 8(f)" (Bd. Br. 31, relying on *Linden Lumber Division v. NLRB*, 419 U.S. 301). The Board's invocation of that precedent is wholly unjustified, and indeed self-defeating. *Linden Lumber* is not "analogous" because it deals with the respective rights and duties of the parties in the ordinary situation where a union is seeking recognition as exclusive bargaining representative on the basis of its demonstration that it is the choice of the majority of the employees in the appropriate bargaining unit. As Bd. Br. 19-22 perforce concedes, § 8(f) created an exception to that situation, permitting employers to enter into agreements with unions which do not have majority support. However, if the precedents dealing with a union's achievement of majority support in the *Linden Lumber* context are pertinent where the employer seeks to repudiate a § 8(f) agreement because the union does not have a majority, the analogy would cut strongly *against* the Board's position

in this case. For where the employer has entered into a § 8(f) agreement, the situation is far more closely analogous to the situation for which the Board has recognized an exception to its *Linden* rule, which it explained as follows in its brief to this Court in that case:

> "In order to encourage the parties to adhere to their voluntary agreements, the Board will continue to find a refusal to bargain in the situation presented in *Snow & Sons, supra* [134 NLRB 709, enformed 308 F.2d 687 (C.A. 9)]. That is, if an employer agrees to have majority status determined by a means other than a Board election, he may not disclaim that determination, and insist on a Board election, simply because he disagrees with the results of that determination. * * * *Nation-Wide Plastics Co.*, 197 NLRB No. 136, 81 LRRM 1036; *Sullivan Elec. Co.*, 199 NLRB No. 97, 81 LRRM 1313; enforced 479 F.2d 1270 (C.A. 6); *Atlantic Tech. Servs. Corp.*, 202 NLRB No. 13, 82 LRRM 1407, enforced, 86 LRRM 2182 (C.A.D.C.)."[46]

So here, "[i]n order to encourage the parties to adhere to their voluntary agreements" an employer should be required to adhere to a § 8(f) agreement unless and until the union is decertified in a Board election. Thus, the *Linden Lumber* line, too, follows the principle which we believe to be decisive, but which the Board's decisions in *Smith* and this case ignore, that parties to collective agreements should adhere to them. Moreover, it is our position rather than that of the Board, which is consistent with the principle which was determined decisive in *Linden Lumber* itself, namely, that "the election process ha[s] acknowl-

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[46] Brief for the National Labor Relations Board in Nos. 73-1231, *et al.*, p. 28, n. 25. See also the Board's decision in *Linden*, 190 NLRB 718, 721.

edged superiority in ascertaining whether a union has majority support'' (*id.* at 304). Congress followed this principle by choosing in the § 8(f) proviso the method by which a union's majority status can be challenged during the term of a § 8(f) agreement; the Board's rule, which permits employer self-help without an election, subverts that principle and defeats that choice.

Given Board counsels' attempted reliance on precedent, it is all the more striking that they omit all mention of *Oilfield Maintenance Co., Inc.*, 142 NLRB 1384, which was declared to be inconsistent with *Smith* by the dissenting Board members (191 NLRB at 696, n. 8) and by the Court of Appeals (480 F.2d at 1190-1191) in that case. In *Oilfield Maintenance*, the General Counsel charged that an employer had violated § 8(a)(5) by repudiating collective agreements with five unions, and substituting therefor a contract with another union. The Board's disposition of the case is significant in two respects:

First, the Board agreed with the General Counsel that the employer had violated §§ 8(a)(5) and 8(d) by repudiating the agreements although the Board did not find that at the time of the repudiation any of the unions represented a majority of the employees, the employer having successfully rebutted the presumption of majority status which carried forward from the original recognition of the unions. See 142 NLRB at 1386-1387. The General Counsel's failure to establish the majority affected only the remedy: The employer was not required to bargain with four of the unions that had lost their majority support after their contracts expired; the employer was, however, required to remedy the unilateral changes instituted prior to the expiration of the contracts (see *id.* at 1388).

Second, the Board did require the employer to bargain with the fifth union, despite its loss of majority support, because the employer had subsequently entered into a valid § 8(f) agreement with that union:

> ''Although, for the reasons set forth above, the majority status of the Pipefitters prior to the commission of the unfair labor practices has not been demonstrated by the General Counsel, the Pipefitters' 1962 contract would still be valid under Section 8(f). Since we have found that Engineering is the *alter ego* of Oilfield, we conclude that the Respondents, whether operating as Oilfield or as Engineering, are bound by that contract until its termination date, subject to the provisions of Section 8(f).'' (*Id.* at 1387, footnote omitted.)

The Board added:

> ''We specifically note in this regard the final proviso to Section 8(f), which provides: 'That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to Section 9(c) or 9(e).' '' (*Id.* at n. 10.)

Thus, *Oilfield Maintenance* confirms that the duty to bargaining during the life of an ordinary collective agreement, entered into with an exclusive bargaining representative, does continue even if the representative has lost his majority status. There is no evidence in the legislative history of § 8(f) that Congress intended to eliminate this duty during the life of a § 8(f) agreement, that is, before the election which may be directed at any time. Additionally, and directly to the point, *Oilfield Maintenance* squarely holds, contrary to the Board in *Smith* and in this case, that a § 8(f) agreement is binding on an employer even if the union has lost its majority status, though the

employer may escape that obligation if he petitions for an election and the union loses.

The Board concludes by asserting, primarily in reliance on *Linden*, that its views are entitled to prevail because "the Board's decision in this and related cases represents a reasonable resolution of various policies of the Act that the Board has evolved over a number of years on the basis of its familiarity with the statute and with the practical problems of the industry" (Bd. Br. 34). This argument is unavailing for several reasons:

First, the Board's brief does not accurately describe the provenance of its decisions in *Smith* and herein. The *Smith* case did not refer to the "practical problems of the industry" but was based entirely on the Board's reading of the language and legislative history of § 8(f); its decision in the present case rests squarely on what the Board deemed to be the necessary consequence of its decision in *Smith*, to which it adhered without even considering the "practical problems" which had been raised by the Court of Appeals in reversing *Smith*.

Second, far from evolving on the basis of experience, the Board's decision in *Smith* was an abrupt departure from a prior unanimous decision, *Oilfield Maintenance Co., Inc.*, 142 NLRB 1384. Neither in *Smith* nor thereafter has the Board explained why *Oilfield Maintenance* was abandoned, despite the pointed reference thereto by the dissenting Board members and by the Court of Appeals, see p. 42 *supra*. This brings into play what was said last Term in *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 143: "We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency." See also, *e.g.*, *Piper* v. *Chris-Craft*, ...

U.S. ....., 45 U.S.L.W. 4182, 4193, n. 27 (Feb. 23, 1977).[47]

Finally, the argument that the Board is entitled to prevail because the majority view "represents a reasonable resolution of the various policies of the Act" (Bd. Br. 34) is "inadmissible here, for the reason that the accommodation between [the] competing factors has already been made by Congress" (*Machinists* v. *Labor Board*, 362 U.S. 411, 428). And even assuming that this case involves review of a judgment as to the proper balance to be struck between conflicting interests, "'[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' *American Ship Building Co.* v. *Labor Board*, 380 U.S. [300] at 318" (*Labor Board* v. *Brown*, 380 U.S. 278, 292).

Once again, "'[i]t is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute.' *Colgate-Palmolive Peet Co.* v. *NLRB*, 338 U.S. 355, 363 (1949)" *Florida Power & Light* v. *Electrical Workers*, 417 U.S. 790, 811-812.)[48]

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[47] By contrast, *Linden Lumber* was the culmination of an "evolutional approach" (cf. *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 265) which had commenced in *Aaron Bros.*, 158 NLRB 1077, a case which consciously departed from prior precedent and explained that departure. See *Gissel*, *supra*, 395 U.S. at 593-594. In the other case cited at Bd. Br. 34-35, *NLRB* v. *Enterprise Association*, 429 U.S. 507, this Court placed emphasis on the Board's consistent adherence to the "right of control principle" which was there approved, see *id.* at 525-526.

[48] The *Florida Power & Light* case presents an instructive parallel to this case. There, the Board argued that since Congress in order to further the employer interest in having loyal super-

III. THE BOARD'S INTERPRETATION OF § 8(b)(7)(C) IS ERRONEOUS.

The Administrative Law Judge deemed himself bound, in deciding this case, by the Board's interpretation of § 8(f) in *R. J. Smith Construction Co., supra*, see Pet. 32a-33a, n. 5. Nevertheless, he recommended dismissal of the complaint on the basis of his interpretation of § 8(b)(7)(C).

He relied on Board holdings that "Section 8(b)(7)(C) is not to be literally applied so as, for example, to reach picketing by a recognized union to secure compliance with an existing contract, since the section was 'intended to proscribe picketing having as its target forcing or requiring an employer's *initial* acceptance of the union as the bargaining representative of his employees.' [Emphasis supplied.]" *Bay Counties District Council of Carpenters, AFL-CIO, et al.*, 154 NLRB 1598, 1605, enforced on a different issue, 382 F.2d 593 (C.A. 9), cert. denied, 389 U.S. 1037, quoting *Building and Construction Trades Council of Santa Barbara County, AFL-CIO, et al. (Sullivan Electric Company)*, 146

visors, permitted employers to discipline them for engaging in union activity, it followed that Congress must also have intended to further that employer interest by permitting the Board to make it an unfair labor practice for a union to discipline supervisors who are union members for not engaging in union activity. This Court rejected that inference, and concluded that Congress had given employers only the option of self-help. Here, the Board argues from the last proviso to § 8(f) (which empowers employers, and others, to petition for an election during the term of a § 8(f) agreement) that Congress must also have intended to allow employers to repudiate their agreements when the union does not have majority support. See particularly *R. J. Smith*, 191 NLRB at 694, and Bd. Br. 25-26. And again, the Board's interference is belied by all that Congress said and did in framing the relevant statutory provision here, § 8(f).

NLRB 1086, 1087, where this principle was first declared (Pet. 36a).

In reversing the ALJ, the Board expressed the view that the finding of a violation necessarily followed from its decision in *R. J. Smith*:

> "For the Board to allow the Respondent to picket to enforce an 8(f) agreement if an employer decides to ignore it, as the Employer herein has done with respect to nonunion jobs, which Respondent could not enforce by means of obtaining an 8(a)(5) bargaining order, is to permit it to do by indirection what it could not do directly, and in effect nullify our decisions in *R. J. Smith* and its progeny that such contracts are voidable by either party if a union never thereafter obtains majority status. In these circumstances, we conclude that the picketing by Respondent to enforce a noneffective 8(f) contract was for initial recognitional purposes and therefore was proscribed by Section 8(b)(7)(C) of the Act." (Pet. 20a-21a)

The logic of this reasoning leaves much to be desired. We do not understand why the filing of an unfair labor practice charge against an employer that under Board law does not state an offense is doing something "directly" and picketing that employer is doing the same thing by "indirection". Further, we find equally illogical the statement that to allow picketing would "in effect nullify our decisions in *R. J. Smith* and its progeny that such contracts are voidable by either party if a union never thereafter obtains majority status". The defect in both statements is the same. It is one thing to say that a contract is "voidable," which means that a party has no legal duty to

comply with it;[49] it is quite another to say that that party has a legal right to be free from economic pressure to comply.[50] This difference is central to much of the law of labor relations, as the Board whose "familiarity with the statute" is proclaimed at Bd. Br. 34, should know. To give an obvious example, an employer is entitled to reject a union's proposed contract terms, in the sense that it is not an unfair labor practice under § 8(5) or otherwise) for him to refuse to agree; but he has no legal right to be free from economic pressure designed to compel agreement; a union which strikes or pickets the employer for that object does not violate the Act. Nevertheless, it is all too plain that the Board has found an unfair labor practice here because the union was guilty of an act of *lese majeste*—its picketing would "in effect nullify [the Board's] decisions * * *" and *this* the Board would not "permit it to do". The vehicle for that result was § 8(b)(7)(C).

In the single sentence herein which even mentions § 8(b)(7)(C), the Board accepted the "initial recognition" limitation which was recognized in *Sullivan Electric* but determined, in disagreement with the ALJ, that "picketing * * * to enforce a noneffective 8(f) contract was for initial recognition purposes". No further explanation is given, but (even if one assumes arguendo that the agreement was "noneffective" after Higdon repudiated it) the statement carries within it a fatal internal contradiction.

[49] It bears repetition that a § 8(f) contract is *not* "voidable", even given *Smith*, because the parties thereto have a legal duty, enforceable under § 301 to comply therewith. See point I, *supra*.

[50] Cf. Prof. Hohfeld's distinction between "privilege" (with its correlative "no-right") and "right" (with its correlative "duty"). W. N. Hohfeld, *Fundamental Legal Conceptions*, Yale paperbound ed., 1964, p. 26.

For, whatever "recognition" may mean in this context, picketing to *retain* the recognition which was obtained by the § 8(f) agreement cannot be picketing for "*initial* recognition". The Board's statement would be logically possible if, and only if, picketing to enforce a § 8(f) agreement which an employer has repudiated has an object to achieve greater recognition than was accorded by the agreement itself. The Board does not say that this is so, much less how it can be, and the Board's brief does not attempt to supply these omissions. We submit that since the Board's decision rests on a logical impossibility it may not stand, even if one accepts, *arguendo*, that a § 8(f) agreement is "voidable by either party" and when repudiated is "noneffective".

The Board's brief attempts to escape the logical dilemma created by the Board's decision by narrowing the *Sullivan Electric* rule to picketing by a union which has once achieved status as exclusive bargaining representative. See particularly Bd. Br. 17-18, and 23-24. If we are right in our demonstration at point II of this brief that a § 8(f) agreement *does* grant exclusive bargaining status, then *Sullivan Electric* is admittedly controlling.[51] But even if we are wrong in point II, the Board is not entitled to prevail, because Board counsel's purported distinction of *Sullivan Electric* finds no basis in the Board's decisions.

The holding of *Sullivan Electric* is described as follows at Bd. Br. 17:

[51] Indeed, for the purposes of this case (rather than for purposes of cases like *Smith* where the issue is whether the employer has violated § 8(a)(5)) the sole relevance of the Board's argument that a § 8(f) agreement does not grant the union the status of exclusive bargaining representative is to avoid *Sullivan Electric*.

"Since the primary purpose of Section 8(b)(7) was to restrain picketing designed to coerce employer recognition of the union as the bargaining representative, the Board has correctly concluded that that section was not intended to apply to situations in which the employer has already recognized the union as the Section 9(a), or majority, representative of its employees. 146 NLRB at 1087."

The critical paragraph in *Sullivan Electric* is the following:

"We find, in agreement with the Trial Examiner, that the sole objective of the Respondents' allegedly unlawful picketing was to compel Sullivan to comply with an existing valid collective-bargaining contract between the parties. However, as described fully in the Trial Examiner's Decision, it is evident that further bargaining between the parties would be required in order to implement the terms of this agreement, even if Sullivan was willing to comply therewith. Thus, by attributing a bargaining objective to the Respondents' picketing and by resorting to a strictly literal construction of the statute, it is arguable that the picketing falls within Section 8(b)(7)'s prohibition against picketing to force an employer '*to recognize* or *bargain with* a labor organization as the representative of his employees.' [Emphasis supplied.] Nevertheless, after analyzing the overall Congressional purpose behind the enactment of this section,[1] we are convinced that the words "recognize or bargain" were not intended to be read as encompassing two separate and unrelated terms. Rather, we believe they were intended to proscribe picketing having as its target forcing or requiring an employer's initial acceptance of the union as the bargaining representative of his employees. When viewed in this posture, it is clear that Sullivan had recognized and extended bargaining rights to the Respondents long before the disputed picketing commenced here and that such picketing therefore was not designed to attain those statutory objectives. Accordingly, we find in agreement with the Trial Examiner that the instant complaint should be dismissed." (146 NLRB at 1087, emphasis in original.)

There is no reference here to § 9(a) or to a "majority". Nor is there any indication that the Board conceived of a category such as that described at Bd. Br. 23 a "kind of recognition as the bargaining representative that would [not] exempt [a union] from the recognitional prohibitions of § 8(b)(7)". Rather, the *Sullivan Electric* opinion indicates that the "initial acceptance" qualification of the literal language is coextensive with the statuory "recognize or bargain."[52] But we need not negate the possibility that the Board might someday declare that it was essential to its holding in *Sullivan Electric* that the union there had been recognized as the exclusive bargaining representative or had once been chosen by a majority of the employees; it is sufficient for present purposes that the distinction advanced by its counsel in this Court was not articulated by the Board itself in *Sullivan Electric* or in any other decision. Given the "facial inconsistencies between the Board's opinion in this case and the [*Sullivan Electric*] decision", this Court must "decline[] to resolve those inconsistencies by substituting Board counsel's rationale for that of the Board." (*NLRB* v. *Food Store Employees*, 417 U.S. 1, 9, citing *Labor Board* v. *Metropolitan Life Insur-*

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[52] In the Board's holding ("the words 'recognize or bargain' * * * were intended to proscribe picketing having as its target forcing or requiring an employer's initial acceptance of the union as the bargaining representative of his employees"), the operative phrase is, but for the word "bargaining", identical to the language of § 8(b)(7) which had been emphasized earlier in the opinion.

ance Co., 380 U.S. 438, 444, and *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-169.) "The integrity of the administrative process demands no less than that the Board, not its legal representative, exercise the discretionary judgment which Congress has entrusted to it." (*Food Store Employees*, 417 U.S. at 9.)

Whether the appropriate disposition of the § 8(b)(7)(C) issue is a remand to the Board as in *Food Store Employees*, and *Metropolitan Life*, or whether outright affirmance of the Court of Appeals denial of enforcement is appropriate depends on whether "possible reconciliation of the Board of the seeming inconsistency [is] reasonably possible" (see 417 U.S. at 9). While we do not feel strongly about this choice,[53] we suggest that such reconciliation is not "reasonably possible," given *Local 86, Painters* (*Carpet Control, Inc.*), 216 NLRB 1127, which the Board decided less than three months after its decision in this case. The Board there said:

> "Respondent and the Company agreed to the terms of an 8(f) agreement with which the Respondent later became dissatisfied. *In an effort to extricate itself from this agreement, Respondent picketed the Company, not, of course, to protest a supposed breach of their agreement as our dissenting colleague believes, but to force compainy acceptance of new contract terms.* This was tantamount to a repudiation by Respondent of the existing 8(f) agreement and compelling renewed recognition of it by the Company under a new agreement with different terms.

[53] Indeed, we believe that a remand for the reasons stated in point I of the brief without reaching any of the other issues is the disposition most consonant with the respective functions of the agency and the courts.

> "Respondent's picketing therefore having a recognitional object within the meaning of Section 8(b)(7)(C), the expedited election which Respondent lost was properly directed, and Respondent's continued picketing thereafter violated Section 8(b)(7)(B) of the Act, all as found by the Administrative Law Judge." (*Id.*, emphasis added.)

In *Local 86, Painters*, the dissenting opinion contended that the union was picketing to protest the employer's breach of the § 8(f) agreement and that therefore its picketing was lawful under *Sullivan Electric*. (*Id.* at 1128.) The majority disagreed with the dissent's factual premise, (that is, as to what the union's objective had been) rather than with the dissent's legal position. If the Board had understood its prior decisions (or its then very recent decision herein) as standing for the proposition that *Sullivan Electric* does not apply to a union which is recognized only pursuant to a § 8(f) agreement, as Board counsel argues, the analysis of the majority opinion would have been entirely different; it would have been unnecessary to consider whether or not the union was protesting the employer's breach. And since here the union admittedly did nothing more than to protest the breach—which was not enough to establish a violation in *Painters*, the Board's decision herein stands alone in its interpretation of § 8(b)(7)(C).[54]

[54] One additional comment must be made with respect to the *Painters* case. In describing the Painters' conduct the opinion said: "This was tantamount to a repudiation by Respondent of the existing 8(f) agreement and compelling renewed recognition * * * under a new agreement with different terms." (216 NLRB at 1127.) This passage could perhaps be read as inconsistent with the Board's decision herein (Pet. 20a), following *R. J. Smith*, that where the union has not achieved the support of a majority, it, like the employer, may repudiate a § 8(f) agreement at will. If the

Thus, *Painters* establishes not only that the Board's decision herein had no antecedent in *Sullivan Electric*, but also that it has no progeny. It is significant, too, that, as we observed earlier, the only reference to § 8(b)(7)(C) in the Board's opinion (Pet. 20a-21a) is a statement of its conclusion, which (quite aside from *Sullivan Electric*) does not follow at all from its interpretation of § 8(f) in *R. J. Smith*. Under these circumstances this Court may well conclude that a remand to "afford[] the Board an opportunity to clarify the inconsistencies" (*Food Store Employees*, 417 U.S. at 9) is a nicety which the agency's performance does not merit. Compare the majority and separate opinions in *Labor Board* v. *Insurance Agents*, 361 U.S. 477.

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opinion were so read, this further inconsistency would be an additional reason for remanding the case to the Board. But, we think that the fairer reading of the opinion is that it was the conjunction of repudiation *and* seeking a new agreement which was the gravamen of the violation in *Painters*. This reading is confirmed by the decision of the Administrative Law Judge (which the majority of the Board affirmed). The ALJ said: "In the circumstances that prevailed, Respondent having, in effect, repudiated the existing 8(f) collective-bargaining agreement—as it was free to do under *R. J. Smith*, *supra*—and having then undertaken through picket line action to force company acceptance of new terms, the only avenue of relief open to the Company was capitulation, tantamount to renewed recognition of the Respondent." (216 NLRB at 1133.) The "repudiation" sentence in the majority opinion is, we believe, a rather cryptic shorthand for the ALJ's analysis, rather than a disavowal of *R. J. Smith*.

CONCLUSION

The judgment of the Court of Appeals should be affirmed or vacated and the case remanded to the Board for further consideration (see pp. 10-13, *supra*).

Respectfully submitted,

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